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REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

Supreme Court of the United States,

IN

AUGUST AND DECEMBER TERMS, 1801,

AND

FEBRUARY TERM, 1803.

VOL. I.

BY WILLIAM CRANCH,

ASSISTANT JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

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POTIUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA.

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.....

1804.

Case on Eqs 5-12-15

District of Columbia....to wit,

BE IT REMEMBERED, That on this twenty-fixth day of June, in the year of our Lord eighteen hundred and four, and in the twenty-eighth year of American Independence, William Cranch, of the faid diſtrict, hath depoſited in this office, the title of a book, the right whereof he claims as author, in the words following, to wit: "Reports of Caſes, argued and adjudged "in the Supreme Court of the United States in Auguſt and De- "cember Terms 1801, and February Term 1803." In conformity to the act of the Congreſs of the United States, entitled "An act "for the encouragement of learning, by ſecuring the copies of maps, "charts and books to the authors and proprietors of ſuch copies "during the times therein mentioned."

G. DENEALE,

Clerk of the Diſtrict of Columbia.

PREFACE.

MUCH of that *uncertainty of the law*, which is ſo frequently, and perhaps ſo juſtly, the ſubject of complaint in this country, may be attributed to the want of American reports.

Many of the cauſes, which are the ſubject of litigation in our courts, ariſe upon circumſtances peculiar to our ſituation and laws, and little information can be derived from Engliſh authorities to lead to a correct deciſion.

Uniformity, in ſuch caſes, can not be expected where the judicial authority is ſhared among ſuch a vaſt number of independent tribunals, unleſs the deciſions of the various courts are made known to each other. Even in the ſame court, analogy of judgment can not be maintained if its adjudications are ſuffered to be forgotten. It is therefore much to be regretted that ſo few of the gentlemen of the bar have been willing to undertake the taſk of reporting.

In a government which is emphatically ſtiled a government of laws, the leaſt poſſible range ought to be left for the diſcretion of the judge. Whatever tends to render the laws certain, equally tends to limit that diſcretion; and perhaps nothing conduces more to that object than the publication of reports. Every caſe decided is a check upon the judge. He can not decide a ſimilar caſe differently, without ſtrong reaſons, which, for his

own juſtification, he will wiſh to make public. The avenues to corruption are thus obſtructed, and the ſources of litigation cloſed.

One of the effects, expected from the eſtabliſhment of a national judiciary, was the uniformity of judicial deciſion; an attempt, therefore, to report the caſes decided by the Supreme Court of the United States, can not need an apology; and perhaps none can be given for the inadequate manner in which that attempt has been executed. It has been the endeavor of the Reporter to give a faithful ſummary of the arguments of counſel. To do them complete juſtice he acknowledges himſelf incompetent. In no inſtance, perhaps, has he given the words in which the ideas were conveyed, as his attention was almoſt entirely occupied in collecting the point of the argument. He may have omitted ideas deemed important, and added others ſuppoſed to be impertinent; but in no caſe has he intentionally diminiſhed the weight of the argument. It may poſſibly be alleged that he has introduced into the reports of ſome of the caſes more of the *record* than was neceſſary. If he has erred in this, he has been led into the error by obſerving that many of the caſes in the books are rendered uſeleſs by the want of a ſufficient ſtatement of the caſe as it appeared upon the record; and he imagined it would be a leſs fault to inſert too much, than to omit any thing material.

He has been relieved from much anxiety, as well as reſponſibility, by the practice which the court has adopt-

ed of reducing their opinion to writing, in all caſes of difficulty or importance; and he tenders his tribute of acknowledgement for the readineſs with which he was permitted to take copies of thoſe opinions.

He is indebted to Mr. Caldwell, for his notes of the caſes which were decided prior to February term 1803, without the aſſiſtance of which he would have been unable to report them, as his own notes of thoſe caſes, not having been taken with that view, were very imperfect.

He alſo feels his obligation to thoſe gentlemen of the bar, whoſe politeneſs has prompted a ready communication of their notes, which have enabled him more correctly to report their arguments.

Should an apology be deemed neceſſary for the liberty he has taken in his notes to ſome of the caſes reported, that apology exiſts in a wiſh candidly to inveſtigate the truth. In doing this in a reſpectful manner, he does not feel conſcious of giving cauſe of offence to liberal and candid minds.

If the fate of the preſent volume ſhould not prove him totally inadequate to the taſk he has undertaken, it is his intention to report the caſes of ſucceeding terms.

CASES REPORTED.

ABERCROMBIE v. Dupuis, page 343
Alexander, Lloyd v. 365
Auld, Hepburn v. 321

B

Bazadone, Clarke v. 212

C

Clark v. Young, 181
Clarke v. Bazadone, 212

D

Dexter, Hodgson v. 345
Dunlop v. Silver, 367
Dupuis, Abercrombie v. 343

F

Fendall, Turner v. 117
Fenwick v. Sears, 259

G

Gardner, Lindo v. 343
Groverman, Hooe v. 215

H

Hamilton v. Russell, 309
Hepburn v. Auld, 321
Hodgson v. Dexter, 345
Hooe v. Groverman, 215
Hooe, U. States v. 318

I

Jameson, Thompson v. 282
Insurance Company Alexandria v. Young, 332

L

Laird, Stuart v. 299
Lenox, Wilson v. 194
Lindo v. Gardner, 343
Lloyd v. Alexander, 365

M

page

Madison, Marbury v. 137
Mandeville v. Riddle, 290
Marbury v. Madison, 137
Mason, Wilson v. 45

O

Owings, Wood v. 239

P

Peggy Schooner, U. States v. 103

R

Resler v. Shehee, 110
Riddle, Mandeville v. 290
Russell, Hamilton v. 309

S

Sears, Fenwick v. 259
Seeman, Talbot v. 1
Shehee, Resler v. 110
Silver, Dunlop v. 367
Simms, U. States v. 252
Stuart v. Laird, 299

T

Talbot v. Seeman, 1
Thompson v. Jameson 282
Turner v. Fendall 117

U

United States v. Hooe, 318
———v. Schooner Peggy, 103
———v. Simms, 252

W

Wilson v. Lenox, 194
——— v. Mason, 45
Wood v. Owings, 239

Y

Young, Clark v. 181
———, Insurance Co. Alexandria v. 332

CASES CITED.

page.

ABNEY v. Kendall, 57
Acheſon v. Fountain, 428
Adamſon, Heylin v. 271, 293, 388
Adair, Clarke v. 427
Aguilar, Geyer v. 16
Allanſon, Foſter v. 335, 337
Allen, Jacob v. 440
Alſop, Lellingham v. 244
Althams caſe, 327
Ancher v. Bank of England, 422, 442
Aris's caſe, 441
Armiſtead v. Philpot, 123, 127, 128 135
Aſher v. Wallis, 442
Aſpinall, Ruſhton v. 201, 210, 273 338
Aſtley v. Reynolds, 441
Avery v. Hoole, 337
Aylett v. Love, 208

B

Baas v. Tingey, 15, 22, 26
Babington v. Lambert, 429
Bailiffs of Bewdley, Regina v. 87
Baird, Skipwith v. 202, 206, 210
Baird v. Blaigrove, 335, 337
Baker v. Hill, 389, 463
Baldwin v. Wethen, 72
Ball, Caldwell v. 439
——, Rumball v. 388, 464
Bank of North America v. M'Knight, 278
Bank of England v. Newman, 400 422
——————, Ancher v. 422, 442
Barbone v. Brent, 442
Barker, King v. 152, 168
Barkley, Jones v. 325, 330
Barloe, Jordan v. 403, 431
Barnet v. Watſon, 290
Barry, Brown v. 207, 266, 270
Beckingham v. Vaghan, 429
Bell v. Chapman, 429
——, Pollard v. 12
Bellamy, Birch v. 86
Benchkin, Ewers v. 391
Bennus v. Guyldley, 335
Benſon v. Flower, 124, 128
—— v. Turton, 453
Bernardi v. Motteux, 12
The Betſy, 16
Bickerdike v. Bollman, 271, 272
Bigg, Rex v. 340
Bingham v. Cabot, 281, 343
Birch v. Bellamy, 86
Birch, Rudge v. 425
Birchall, Moulſdale v. 425
Bird, Rex v. 123, 128
——, Staple v. 135
Biſhop v. Young, 388, 465
Blackſtone, Lavender v. 312
Blackwell v. Harper, 78, 97
Blaigrove, Baird v. 335, 337
Bland, Robertſon v. 87
Bollman, Bickerdike v. 271, 272
Bond v. Nutt, 226, 227
Bottomly v. Brooke, 425
Boulton v. Hilleſden, 399
Bourne v. Maſon, 430
Bradford v. Smith, 71
Brent, Barbone v. 442
Brett v. Read, 335
Bridges, Tyman v. 329
Brig Perſeverance, Jennings v. 320
Bright v. Purrier, 271
Briſcoe, Conſella v. 71
—— v. Swearingen, 71
Bromwich v. Lloyd, 372, 381, 397
Brooke, Bottomly v. 425
Brown v. Barry, 207, 266, 270
—— v. Bullen, 442
——, Fowler v. 466
—— v. Harraden, 416

page.
Brown v. London, 388, 429, 463
——— v. Tindall, 273, 278
Browning v. Morris, 442
Buckingham v. Coſtendine, 335
Bullen, Brown v. 442
Buller v. Crips, 372, 381, 382, 411 432
——— v. Harriſon, 442
Bulſtrode v. Gilburn, 335
Bunniworth v. Gibbs, 448
Burrage, King v. 72
Burrough of Midhurſt, Rex v. 152
Burton v. Souter, 410
Butcher v. Swift, 404
Byas, *ex parte*, 246

C

Cabot, Bingham v. 281, 343
Cadogan v. Kennet, 312
Caldwell v. Ball, 439
Call, Scott v. 202, 210
Campbell, Hitchen v. 440, 442, 184 188
———, Kitchen v. 184, 188, 440 442
———, Wright v. 439
Cannon v. Smallwood, 128
Cardy, Hawkins v. 372, 400
Carter v. Downiſh, 370
———, Hibberts v. 439
——— v. Palmer, 402, 404, 431
——— v. Pearce, 201
Carthage v. Manby, 326
Cary v. Webſter, 442
Caſtles' caſe, 254
Chamberlyn v. Delarive, 184, 186 188
Chapman, Bell v. 429
——— v. Emery, 70
Chat, Edgar v. 386
Cheeſeman, Starke v. 402
Chicheſter, Vaſs v. 210, 338
Child, Walmſley v. 417
Chute, Meredith v. 463
Clark v. Nightengale, 305
Clarke v. Adair, 427
——— v. Reynolds, 313
——— v. Shee and Johnſon, 442
——— v. Smith, 443

page.
Clarke v. Martin, 294, 408, 431 462
Claxton v. Swift, 271
Coggs, Horton v. 391, 402, 406
Collins v. Emmit, 442
Comyns, Morrough v. 424
Conſella v. Briſcoe, 71
Cooper, Monk v. 358
Core v. Woddye, 428, 429, 440, 463
Corvens' caſe, 353
Coſtendine, Buckingham v. 335
Cox, M'Quillin v. 208
Coxe v. Wirrall, 114
Cramlington v. Evans, 391, 429
Crawly v. Crowther, 294, 404
Creagh, Welſh v. 462, 465
Crips, Buller v. 372, 381, 382, 411 432
Cromwell v. Floyd, 399
Crop v. Norton, 328
Crow, Dougherty v. 71
Crowther, Crawly v. 294, 404
Cutler, Marſh v. 288
Cutting v. Williams, 410

D

Darrach v. Savage, 391
Dartnall v. Morgan, 339
Dauchy, Wiſcart v. 11
Davis, Mackie v. 184, 186, 273 449, 458
———, Feltmakers v. 430
Davy, Newdigate v. 442
Dawes v. Ferres, 87
Dedire, Freemoult v. 12
Dehers v. Harriot, 392
Delarive, Chamberlyn v. 184, 186 188
Denabie, Diſborne v. 429
Dimocke, Hornſey v. 429, 442
Dingwall v. Dunſtar, 200
Diſborne v. Denabie, 429
Dittlesfield, Oble v. 429
Doe v. Routledge, 70
Dolly, Goodall v. 272
Domingo Franca's caſe, 463
Dougherty v. Crow, 71
Douglas, Iſrael v. 427

page.

Downes, Holland *v.* 248
Downish, Carter *v.* 370
Downman *v.* Downman, 113
Drake, Slade *v.* 72
Draper *v.* Glassop, 465
Dunlop, Innes *v.* 437
Dunstar *v.* Pierce, 270
Dunstar *v.* Dingwall, 200
Dutton *v.* Poole, 430
Dymes *v.* Smith, 407

E

Eaglechild's case, 369
Edgar *v.* Chat, 386
Edie *v.* E. I. Company, 340, 372 428, 432
Edwards *v.* Harben, 312, 316
E. India Company, Edie *v.* 340, 372 428, 432
Elborough's case, 389
Emery, Chapman *v.* 70
Emmit, Collins *v.* 442
England, Quantock *v.* 466
Ennis, Tonkins *v.* 76
Eppes *v.* Randolph, 311, 316
Essery, Fry *v.* 71
Evans, Cramlington *v.* 391, 429
—— *v.* Martlett, 439
——, Sadler *v.* 442
——, Ward *v.* 295, 416
Ewers *v.* Benchkin, 391

F

Fabrigas, Mostyn *v.* 12
Farr *v.* Newman, 87
Feltham *v.* Terry, 442
Feltmakers *v.* Davis, 430
Fenn *v.* Harrison, 422
Fenner *v.* Meares, 426, 436, 448
Fenton, Trueman *v.* 466
Ferres, Dawes *v.* 87
Fiddall *v.* Hussey, 441
Field, Hancock *v.* 326, 329
——, Williams *v.* 397
Fleetwood, Thornby *v.* 72
Fleming, Sheppard *v.* 406
Flewellin *v.* Rave, 429
Flower, Benson *v.* 124, 128

page.

Floyd, Cromwell *v.* 399
Ford *v.* Hopkins, 404
Forward *v.* Pittard, 359
Foster *v.* Allanson, 335, 337
—— *v.* Smith, 335
Fountain, Acheson *v.* 428
Fowle, Gibbs *v.* 407
Fowler *v.* Brown, 466
Fowler *v.* Padget, 246
Fox, Miller *v.* 71
Francisco, Winston *v.* 338
Freemoult *v.* Dedire, 12
Fry *v.* Essery, 71

G

Garret, Pearson *v.* 395
Gerard *v.* La Coste, 439
Geyer *v.* Aguilar, 16
Gibbs, Glass *v.* 18
—— *v.* Fowle, 407
Gibbs, Bunniworth *v.* 448
Gibson *v.* Minet, 427, 442
Gilburn, Bulstrode *v.* 335
Gill, Haselinton *v.* 312
Gittings, Hall *v.* 249
Glass *v.* Gibbs, 18
Glassop, Draper *v.* 465
Goodall *v.* Dolly, 272
Goodison *v.* Nunn, 325, 330
Goodwright *v.* Wright, 87
Gordon *v.* Harper, 313
Gouch's case, 70
Gouthit, Nicholson *v.* 103
Grant *v.* Vaughan, 294, 386, 391 392, 399, 403, 416, 433, 442
Green *v.* Harrington, 335
Guyldley, Bennes *v.* 335

H

Hadves *v.* Levit, 430
Haldimand, Macbeath *v.* 352, 356 364
Hall *v.* Gittings, 249
——, Pinckney *v.* 371, 398
Hancock *v.* Field, 326, 329
Harben, Edwards *v.* 312, 316
Hard's case, 465
Harper, Blackwall *v.* 78, 97

page.
Harper, Gordon v. 313
Harraden, Brown v. 416
Harrington, Green v. 335
Harriot, Dehers v. 392
Harris v. Huntback, 442
———, Tatlock v. 427, 435, 442
Harriſon, Buller v. 442
———, Fenn v. 422
Harry v. Perrit, 271
Haſelinton v. Gill, 312
Haſſer v. Wallis, 272
Hawes v. Levit, 430
Hawkes v. Saunders, 441, 449
Hawkins v. Cardy, 372, 400
Hently, Shelden v. 389
Heylin v. Adamſon, 271, 293, 388
Hibberts v. Carter, 439
Hill, Baker v. 389, 463
—— v. Lewis, 270, 393, 431
Hilleſden, Boulton v. 399
Hind v. Martyn, 430
Hinton's caſe, 294, 390
Hitchen v. Campbell, 440, 442, 184 188
Hodges v. Steward, 371, 391, 392 402, 430, 465
Hooe's caſe, 123, 326, 328
—— v. Marſhall, 326, 329
Holland v. Downes, 248
Holliday, Williamſon v. 379
Holme v. Lucas, 335, 338
Holt, Mogadara v. 371
Hoole, Avery v. 337
Hooper v. Smith, 242
Hopkins, Ford v. 404
Hornſey v. Dimocke, 429, 442
Horton v. Coggs, 391, 402, 406
Houſton, M'Culloch v. 459
Howard, Norfolk v. 390
———, Wood v. 441
Hughes, Rann v. 445
Huntback, Harris v. 442
Huſſey v. Fiddall, 441

I

Jacob v. Allen, 440
Jefferys v. Walter, 114
Jennings v. Brig Perſeverance, 320
———, Mallery v. 243
Innes v. Dunlop, 437
Ingraham, Reed v. 438
Joddrel, Taylor v. 114
Johnſon, Reade v. 335
Jones v. Berkley, 325, 330
—— v. Williams, 72
Jordaine v. Laſhbrooke, 200, 203 204
Jordan v. Barloe, 403, 431
Irving v. Wilſon, 441
Iſaacs v. Willis, 71, 74
Iſrael v. Douglas, 427

K

Kearſlake v. Morgan, 184, 186, 188
Keely, Winch v. 245, 425
Kennet v. Cadogan, 312
Kenny, Longchamp v. 294
King v. Barker, 152, 168
—— v. Burrage, 72
—— v. Newcomb, 71
Kitchen v. Campbell, 184, 188, 440 442
Kite v. Stevenſon, 71

L

La Coſte, Gerard v. 439
Lamb, Lawſon v. 404
Lambert, Babington v. 429
———— v. Oakes, 187, 401, 450
Langſtaffe, Ruſſell v. 273
Laſhbrooke v. Jordaine, 200, 203 204
Lavender v. Blackſtone, 312
Lawſon v. Lamb, 404
Lee v. Love, 184, 186, 458
Leſtley v. Mills, 270
Legats' caſe, 430
Le Neve v. Le Neve, 57
Lellingham v. Alſop, 244
Levit, Hadves v. 430
——, Hawes v. 430
Levy, Moravia v. 340

page.
Lewis, Hill v. 270, 393, 431
———, Taſſel v. 270
———, Vere v. 442
Lloyd, Bromwich v. 372, 381, 397
Locke, Platt v. 440
London, Brown v. 388, 429, 463
Longchamp v. Kenny, 294
Loſh v. Williamſon, 445
Love, Aylett v. 208
——, Lee v. 184, 186, 458
Loxdale, Rex v. 86
Lucas, Holme v. 335, 338

M

Macauley, Ward v. 313
Macbeath v. Haldimand, 352, 356 364
Macferlan, Moſes v. 272, 442
Mackie v. Davis, 184, 186, 273 449, 458
Mallery v. Jennings, 243
Manning, More v. 428
Manby, Carthage v. 326
The Maria, 13, 16, 24
Marſh v. Cutler, 288
Marſhall, Hoe v. 326, 329
Martin, Clerk v. 294, 408, 431, 462
Martlett, Evans v. 439
Martyn v. Hind, 430
Maſon, Bourne v. 430
Maſter v. Miller, 424
Mayer, Milford v. 270
M'Culloch v. Houſton, 459
M'Knight, Bank N. America v. 278
M'Quillin v. Cox, 208
M'Williams v. Smith, 278
Meares, Fenner v. 426, 436, 448
Meredith v. Chute, 463
Merry v. Abney, 57
Mill, Starkey v. 430, 442
Miller v. Fox, 71
——, Maſter v. 424
—— v. Race, 294
Milford v. Mayer, 270
Mills, Leftley v. 270
Milton's caſe, 387, 462
Minet, Gibſon v. 427, 442

page.
Minnis v. Pollard, 186
Mogadara v. Holt, 371
Monk v. Cooper, 358
Moravia v. Levy, 340
More v. Manning, 428
Morgan, Dartnall v. 335
———, Kearſlake v. 184, 186, 188
———, Stradling v. 72
Morris, Browning v. 442
Morrough v. Comyns, 424
Moſes v. Macferlan, 272, 442
Moſtyn v. Fabrigas, 12
Motteux, Bernardi v. 12
Moulſdale v. Birchall, 425

N

Napper, Norris v. 442
Newcomb, King v. 71
Newdigate v. Davy, 442
Newman, Bank of England v. 400 422
———, Farr v. 87
Nicholſon v. Gouthit, 103
——— v. Sedgwick, 391, 399 402
Nightengale, Clark v. 305
Norfolk v. Howard, 390
Norris v. Napper, 442
Norton, Crop v. 328
———, Rippon v. 430
——— v. Roſe, 451
Nunn, Goodiſon v. 325, 330
Nutt, Bond v. 226, 227

O

Oakes, Lambert v. 187, 401, 450
Oble v. Dittlesfield, 429
Owen v. Wilſon, 71

P

Padget, Fowler v. 246
Paine, Sadler v. 430
Palmer, Carter v. 402, 404, 431
Parker, Spieres v. 337
Peacock v. Rhodes, 422, 451

page.
Pearce, Carter *v.* 201
Pearſon *v.* Garret, 395, 465
———, Potter *v.* 410
Pelly *v.* Royal Ex. Aſſurance, 335
Pemberton *v.* Shelton, 288
Perrit, Harry *v.* 271
Philips, Porter *v.* 326, 329
Philpot, Armiſtead *v.* 123, 127, 128 135
Pierce, Dunſtar *v.* 270
Pillans *v.* Van Mierop, 373, 443
Pinkney *v.* Hall, 371, 398
Pittard, Forward *v.* 359
Platt *v.* Locke, 440
Pleydell, Powell *v.* 70
Pollard *v.* Bell, 12
———, Minnis *v.* 186
Poole, Dutton *v.* 430
Porter *v.* Philips, 326, 329
Potter *v.* Pearſon, 410
Powell *v.* Pleydell, 70
Prager, Smith *v.* 200
Price, Rudder *v.* 211, 388, 464
The Princeſſa, 21
The Providentia, 12
Pulteney, Walpole *v.* 203
Purrier, Bright *v.* 271
Pyers *v.* Turner, 335

Q

Quantock *v.* England, 466

R

Rables *v.* Sikes, 389
Race, Miller *v.* 294
Randolph, Eppes *v.* 311, 316
Rann *v.* Hughes, 445
Rave, Flewellin *v.* 429
Read, Brett *v.* 335
—— *v.* Johnſon, 335
Reed *v.* Ingraham, 438
Regina *v.* Bailiffs of Bewdley, 87
Reynolds *v.* Clarke, 313
———, Aſtley *v.* 441
Rex *v.* Bigg, 340
—— *v.* Bird, 123, 128
—— *v.* Burrough of Midhurſt, 152
Rex *v.* Hay, 152
—— *v.* Loxdale, 86
—— *v.* Robinſon, 254
—— *v.* Turkey Company, 152
—— *v.* Webb, 123
Rhodes, Peacock *v.* 422, 451
Rice *v.* Shute, 87
Rippon *v.* Norton, 430
Robb, Taliaferro *v.* 335
Robertſon *v.* Bland, 87
——— *v.* Vogle, 278, 459
Robinſon, Rex *v.* 254
Rolle, Ryall *v.* 314
Roſe, Norton *v.* 451
Routledge, Doe *v.* 70
Rowe, Woodward *v.* 369, 387
Royal Ex. Aſſurance, Pelly *v.* 335
Rudder *v.* Price, 211, 388, 464
Rudge *v.* Birch, 425
Ruff *v.* Webb, 188
Rumball *v.* Ball, 388, 464, 465
Ruſhton *v.* Aſpinal, 201, 210, 273 338
Ruſſell *v.* Langſtaffe, 273
Ryall *v.* Rolle, 314

S

Sadler *v.* Evans, 442
—— *v.* Paine, 430
The Santa Cruz, 12
Saunders, Hawkes *v.* 441, 449
Savage, Darrach *v.* 391
Scott *v.* Call, 202, 210
Sedgwick, Nicholſon *v.* 391, 399 402
Shaw, Wherwood *v.* 429, 440
Shee, Clarke *v.* 442
Sheldon *v.* Hentley, 389
Shelton, Pemberton *v.* 288
Sheppard *v.* Flemyng, 406
Sherynton *v.* Strotton, 444
Shute, Rice *v.* 87
Sikes, Rables *v.* 389
Skipwith *v.* Baird, 202, 206, 210
Slade's caſe, 463
Slade *v.* Drake, 72
Slatford, Thurſton *v.* 268
Smallwood, Cannon *v.* 128

page.

Smallwood v. Vernon, 292
Smart v. Williams, 248
Smith v. Bradford, 71
——, Clarke v. 443
——, Dymes v. 407
——, Foſter v. 335
——, Hooper v. 242
——, M'Williams v. 278
—— v. Prager, 200
Souter, Burton v. 410
Spieres v. Parker, 337
Stamforth, Tarleton v. 335
Staple v. Bird, 335
Starke v. Cheeſeman, 402
Starkey v. Mill, 430, 442
Stevens v. White, 207
Stevenſon, Kite v. 71
Steward, Hodges v. 371, 391, 392 402, 430
The St. Bernardo, 21
Stradling v. Morgan, 72
Strotton, Sherington v. 444
Swearingen v. 71
—— v. Briſcoe, 71
Swift, Butcher v. 404
——, Claxton v. 271, 391

T

Taliaferro v. Robb, 335
Tarleton v. Stamforth, 335
Taſſel v. Lewis, 270
Tatlock v. Harris, 427, 435, 442
Taylor v. Joddrel, 114
—— v. Wheeler, 245
Temple v. Welds, 442
Terry, Feltham v. 442
Tey's caſe, 210
Thornby v. Fleetwood, 72
Thorpe v. Thorpe, 325, 328, 329
Thurſton v. Slatford, 268
Tindall v. Brown, 273, 278
Tingey Baas v. 15, 22, 26
Toft, Turner v. 406
Tomkins v. Ennis, 70
Trueman v. Fenton, 466
Turner, Pyers v. 335
—— v. Toft, 406
——, Vanheath v. 369

page.

Turton v. Benſon, 453
The Two Friends, 14, 16, 21, 26
Tyman v. Bridges, 329

U

Unwin v. Wolſeley, 354, 357, 365
Vaghan, Beckingham v. 429
Vallejo v. Wheeler, 221, 224
Vanheath v. Turner, 369
Van Mierop, Pillans v. 373, 443
Vaſs v. Chicheſter, 210, 338
Vaughan, Grant v. 294, 386, 391 392, 399, 403, 416, 433, 442.
Vere v. Lewis, 442
Vernon, Smallwood v. 292
Vogle, Robertſon v. 278, 459
The Vryheid, 18

W

Wagſtaffe v. Wagſtaffe, 87
Walker v. Witter, 208, 210
—— v. Walker, 439
Wallis, Aſher v. 442
——, Haſſer v. 272
Walmſley v. Child, 417
Walpole v. Pulteney, 203
Walter, Jefferys v. 114
Ward v. Evans, 295, 416
—— v. Macauley, 313
The War Onſkan, 14, 16
Warſley v. Wood, 335
Watſon, Barnet v. 290
Way v. Yally, 12
Webb, Rex v. 123
——, Ruff v. 188
Webſter, Cary v. 442
Welds, Temple v. 442
Welſh v. Creagh, 462, 465
Wethen v. Baldwin, 72
Wheeler, Vallejo v. 221, 224
——, Taylor v. 245
Wherwood v. Shaw, 429, 440
White, Stevens v. 207
Williams v. Cutting, 410
—— v. Field, 397
—— v. Holliday, 379

page.

Williams, Jones *v.* 72
———, Smart *v.* 248
——— *v.* Williams, 371, 395, 462
Williamſon, Loſh *v.* 445
Willis, Iſaacs *v.* 71, 74
Wilſon, Irving *v.* 441
———, Owen *v.* 71
Winch *v.* Keely, 245, 425
Winſton *v.* Franciſco, 338
Wirrall, Coxe *v.* 114
Wiſcart *v.* Dauchy, 11
Witter, Walker *v.* 208, 210, 335
Woddye, Core *v.* 428, 429, 440, 463
Wolſeley, Unwin *v.* 345, 357, 365
Wood, Howard *v.* 441
———, Warſley *v.* 335
Woody's caſe, 209
Woodward *v.* Rowe, 369, 387
Woolvil *v.* Young, 399
Wright *v.* Campbell, 439
———, Goodright *v.* 87

Y

Yally, Way *v.* 12
Young, Biſhop *v.* 388, 465
———, Woolvil *v.* 399

RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

I.—1790, FEBRUARY 3.

Ordered, That John Tucker, esq. of Boston, be the clerk of this court.

That he reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counsellor in this court, while he shall continue to be clerk of the same.

II.—1790, FEBRUARY 5.

Ordered, That (until further orders) it shall be requisite to the admission of attornies, or counsellors, to practice in this court, that they shall have been such for three years past in the supreme courts of the the state to which they respectively belong, and that their private and professional character shall appear to be fair.

III.—1790, FEBRUARY 5.

Ordered, That counsellors shall not practice as attornies, nor attornies as counsellors in this court.

IV.—1790, FEBRUARY 5.

Ordered, That they shall respectively take the following oath, viz. "I do solemnly swear, that I will demean myself (as an attorney or counsellor) of the court, uprightly, and according to law, and that I will support the constitution of the United States."

V.—1790, FEBRUARY 5.

Ordered, That (unless and until it shall otherwise be provided by law) all process of this court shall be in the name of the President of the United States.

VI.—1791, FEBRUARY 7.

Ordered, that the counsellors and attornies, admitted to practice in this court, shall take either an oath, or in proper cases, an affirm-

ation, of the tenor prescribed by the rule of this court on that subject, made February term, 1790, viz. "I do solemnly swear, (or affirm, as the case may be,) that I will demean myself as an attorney, or counsellor of this court, uprightly, and according to law, and that I will support the constitution of the United States."

VII.—1791, August 8.

The Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII.—1795, February 4.

The Court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of a cause.

IX.—1795, February 17.

The Court declared that all evidence on motions for a discharge upon bail, must be by way of *deposition*, and not *vivâ voce*.

X.—1796, August 12.

Ordered, That process of subpœna issuing out of this court, in any suit in equity, shall be served on the defendant *sixty days* before the return day of the said process; and further, that if the defendant on such service of the subpœna shall not appear at the return day, contained therein, the complainant shall be at liberty to proceed *ex parte*.

XI.—1797, February 13.

It is ordered by the Court, that the clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII.—1797, August 7.

It is ordered by the Court, that no record of the court be suffered by the clerk, to be taken out of his office, but by the consent of the court; otherwise to be responsible for it.

XIII.—1800, AUGUST 15.

In the case of *Course v. Stead's executors*,

Ordered, That the plaintiff in error be at liberty to show to the satisfaction of this court, that the matter in dispute exceeds the sum or value of 2000 dollars, exclusive of costs; this to be made appear by affidavit, on days notice to the opposite party or their counsel in Georgia. Rule as to affidavits to be mutual.

XIV.—1801, AUGUST 12.

Ordered, That counsellors may be admitted as attornies in this court on taking the usual oath.

XV.—1801, DECEMBER 9.

It is *ordered*, That in every cause where the defendant in error fails to appear, the plaintiff may proceed *ex parte*.

XVI.—1803, FEBRUARY TERM.

It is ordered, That where the writ of error issues within 30 days before the meeting of the court, the defendant in error is at liberty to enter his appearance and proceed to trial; otherwise the cause must be continued.

XVII.—1803, FEBRUARY TERM.

In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of *ten per centum per annum*, on the amount of the judgment.

XVIII.—1803, FEBRUARY TERM.

In such cases where there exists a real controversy, the damages shall be only at the rate of *six per centum per annum*. In both cases the interest is to be computed as part of the damages.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

FROM THE TIME OF ITS FIRST ESTABLISHMENT; WITH THE DATES OF THEIR COMMISSIONS.

.....

JOHN JAY, *Chief Juſtice*,	-	26 September, 1789.
WILLIAM CUSHING, *Aſſociate Juſtice*,		27 September, 1789.
JAMES WILLSON,	*ditto*,	29 September, 1789.
JOHN BLAIR,	*ditto*,	30 September, 1789.
JAMES IREDELL,	*ditto*,	10 February, 1790.
THOMAS JOHNSON,	*ditto*,	7 November, 1791.
WILLIAM PATERSON,	*ditto*,	4 March, 1793.
JOHN RUTLEDGE, *Chief Juſtice*,		1 July, 1795.
SAMUEL CHASE, *Aſſociate Juſtice*,		7 January, 1796.
OLIVER ELLSWORTH, *Chief Juſtice*,		4 March, 1796.
BUSHROD WASHINGTON, *Aſſ. Juſtice*,		20 December, 1798.
ALFRED MOORE,	*ditto*,	10 December, 1799.
JOHN MARSHALL, *Chief Juſtice*,		31 January, 1801.
WILLIAM JOHNSON, *Aſſociate Juſtice*,		March, 1804.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE JOHN MARSHALL, CHIEF JUSTICE.

The honorable WILLIAM CUSHING,
The honorable WILLIAM PATERSON,
The honorable SAMUEL CHASE,
The honorable BUSHROD WASHINGTON,
AND
The honorable ALFRED MOORE.

} ASSOCIATE JUSTICES.

LEVI LINCOLN, ESQUIRE, ATTORNEY-GENERAL.

ERRATA.

Page 16, line 25, for Aquilar, read *Aguilar.*
Page 18, line 14, for Tabot, read *Talbot.*
Page 32, line 20, for arms of, read *arms or.*
Page 55, line 18, of the note, for judiciously, read *judicially.*
Page 56, line 31, of the note, for any, read *my.*
Page 111, line 36, of the note, for inquiry, read *injury.*
Page 152, line 17, of the note, for 1067, read 1267.
Page 278, line 34, for did give, read *did not give.*
Page 294, line 31, after second, insert *count.*
Page 308, line 7, for 1802 and 1801, read 1801 *and* 1802.
Page 310, line 2, for defendant, read *plaintiff in error.*
Page 369, line 18, for Helty, read *Hetly.*
Page 370, line 11, for the, read *be.*
Page 444, line 26, for Strolton, read *Stratton.*

SUPREME COURT U. S.

AUGUST, 1801.

SILAS TALBOT *v.* HANS FRED. SEEMAN.

TALBOT v. SEEMAN.

Salvage allowed to a United States ship of war, for the re-capture of a Hamburgh vessel out of the hands of the French, (France and Hamburgh being neutral to each other) on the ground that she was in danger of condemnation under the French decree of 18th January, 1798. The United States & France, in the year 1799, were in a state of partial war. To support a demand for salvage, the re-capture must be lawful, and a meritorious service must be rendered. *Probable cause* is sufficient to render the re-capture lawful. Where the amount of sal-

THIS was a writ of error to reverse a decree of the circuit court which reversed the decree of the district court of New-York so far as it allowed salvage to the re-captors of the ship Amelia and her cargo.

The libel in the district court was filed November 5th 1799, by captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the Constitution, against the ship Amelia, her tackle, furniture and cargo; and sets forth:

1. That in pursuance of instructions from the president of the United States he subdued, seized, &c. on the high seas, the said ship Amelia and cargo, &c. and brought her into the port of New-York.

2. That at the time of capture she was armed with eight carriage-guns and was under the command of citoyen Etienne Prevost, a French officer of marine, and had on board, besides the commander, eleven French mariners. That the libellant has been informed that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East-Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called La Diligente, commanded by L. J. Dubois, who took out of her the captain and crew of the Amelia, with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for *adjudication*, as a good and lawful prize; and that she remained in the

TALBOT v. SEEMAN.

full and peaceable poſſeſſion of the French, from the time of her capture, for the ſpace of ten days, whereby, the libellant is adviſed, that, as well by the law of nations, as by the paticular laws of France, the ſaid ſhip became, and was to be conſidered as a French ſhip.

Whereupon, he prays uſual proceſs, &c. and condemnation; or, in caſe reſtoration ſhould be decreed, that it may be on payment of ſuch ſalvage as by law ought to be paid for the ſame.

vage is not regulated by poſitive law, it muſt be determined by the principles of general law. Marine ordinances of foreign countries, promulgated by the executive, by order of the legiſlature of the United States, may be read in the courts of the United States, without further authentication or proof. Municipal laws of foreign countries are generally to be proved as facts.

The claim and anſwer of Hans Frederic Seeman in behalf of Meſſrs. Chapeau Rouge and Co. of Hamburgh, owners of the ſhip Amelia and her cargo, ſtated, That the ſaid ſhip commanded by Jacob F. Engelbrecht, as maſter, ſailed on the 20th of February, 1798, from Hambugh on a voyage to the Eaſt-Indies, where ſhe arrived ſafe; that in April, 1799, ſhe left Calcutta bound to Hamburgh; that during her voyage, and at the time of her capture by the French, ſhe and her cargo belonged to Meſſrs. Chapeau Rouge and Co. citizens of Hamburgh, and if reſtored ſhe will be wholly their property; that on the 6th of September, on her voyage home, ſhe was captured on the high ſeas by a French armed veſſel commanded by citizen Dubois, who took out the maſter and thirteen of her crew and all her papers, leaving on board the claimant, who was mate of the Amelia, the doctor, and five other men. That the French commander put on board twelve hands and ordered her to St. Domingo, and parted from her on the 5th day after her capture. That on the 15th of September, the Amelia, while in poſſeſſion of the French, was captured, without any reſiſtance on her part, by the ſaid ſhip of war, the Conſtitution, and brought into New-York. That the Amelia had eight carriage guns, it being uſual for all veſſels in the trade ſhe was carrying on to be armed, even in times of general peace. That there being peace between France and Hamburgh at the time of the firſt capture, and alſo between the United States and Hamburgh, and between the United States and France, the poſſeſſion of the Amelia by the French, in the manner, and for the time ſtated in the ſaid libel, could neither by the laws of nations, nor by the laws of France, nor by thoſe of the United States, change the property of the ſaid ſhip Amelia and her cargo, or make the ſame liable

to condemnation in a French court of admiralty; that the same could not therefore be considered as French property; wherefore, he prays restoration in like plight as at the time of capture by the ship Constitution, with costs and charges.

On the 16th December, 1799, the district judge, by consent of parties, made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund in case the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, &c.

Afterwards, on the 25th of February, 1800, the judge of the district court made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship Constitution, to be distributed according to the act of congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the Amelia or their agent.

From this decree the claimant appealed to the circuit court.

At the circuit court for the district of New-York in April, 1800, before judge Washington and the district judge, the cause was argued by B. Livingston and Burr for the appellant, and Harrison and Hamilton for the respondent; and on the 9th of April, 1800, the circuit court made the following decree, viz.

"That the decree of the district court, so far forth as it "orders a payment, by the clerk, of a moiety of the gross "amount of sales to Silas Talbot, commander, &c. and to "the officers and crew of the said ship Constitution, is "erroneous, and so far forth be reversed without costs; "that is to say, the court, considering the admission on

TALBOT v. SEEMAN.

"the part of the respondent, that the papers brought "here by Jacob Frederic Englebrecht, master of the "said ship Amelia, prove her and her cargo to be Ham- "burgh property, and also considering that as the nation "to which the owners of the said ship and cargo belong, "is in amity with the French republic, the said ship and "cargo could not, consistently with the laws of nations, "be condemned by the French as a lawful prize, and that "therefore no service was rendered by the United States "ship of war the Constitution, or by the commander, "officers or crew thereof, by the re-capture aforesaid.

"Whereupon it is ordered, adjudged and decreed by "the court, and it is hereby ordered, adjudged and de- "creed by the authority of the same, that the former "part of the decree of the district court, by which a "moiety of the proceeds is allowed to the commander, "officers and crew aforesaid, be and the same is hereby "reversed.

"And the court further considering all the circum- "stances of the present case arising from the capture and "re-capture stated in the libel and claim and answer, and "that by the sale of the said ship Amelia and her cargo, "made with the express consent of the appellant, the costs "and charges in this cause have nearly all accrued, and "that therefore the expenses should be defrayed out of "the proceeds, Thereupon, it is hereby further ordered, "adjudged and decreed by the court, that so much of "the said decree of the said district court as relates to the "payment, by the clerk, to the several officers of the "court, and to the proctors of the libellant and claimant "in this cause, of their taxed costs and charges, out of "the other moiety of the said proceeds, and also of the "residue of the said last mentioned moiety, after deduct- "ing the costs and charges aforesaid, to the owner or "owners of the said ship Amelia and her cargo, or to "their legal representatives, be and the same is hereby "affirmed.

To reverse this decree the libellant sued out a writ of error to the supreme court, and by consent of parties, the following statement of facts was annexed to the re- cord which came up.

"The ship Amelia sailed from Calcutta in Bengal, in "the month of April, 1799, loaded with a cargo of the "product and manufactory of that country, consisting "of cotton, sugars, and dry goods in bales, and was "bound to Hamburgh.

"On the 6th of September in the same year, she was "captured, while in the pursuit of her said voyage, by "the French national corvette La Diligente, L. J. Dubois "commander, who took out her captain and part of her "crew, together with most of her papers, and placed a "prize master and French sailors on board of her, order-"ing the prize master to conduct her to St. Domingo, to "be judged according to the laws of war.

"On the 15th of the same month of September, the "United States ship of war the Constitution, command-"ed by Silas Talbot, esquire, the libellant, fell in with "and re-captured the Amelia, she being then in full pos-"session of the French, and pursuing her course for St. "Domingo according to the orders received from the "captain of the French corvette.

"At the time of the re-capture, the Amelia had eight "iron cannon mounted, and eight wooden guns, with "which she left Calcutta, as before stated.

"From such of the ships papers as were found on "board, and the testimony in the cause, the ship Amelia "and her cargo appear to have been the property of "Chapeau Rouge, a citizen of Hamburgh, residing and "carrying on commerce in that place.

"It is conceded that the republic of France and "the city of Hamburgh are not in a state of hostility to "each other; and that Hamburgh is to be considered "as neutral between the present belligerent powers.

"The Amelia and her cargo, having been sent by "captain Talbot to New-York, were there libelled in "the district court, and such proceedings were thereupon "had in that court, and the circuit court for that dis-"trict, as may appear by the writ of error and re-"turn."

TALBOT v. SEEMAN.

The cauſe now came on to be argued at Auguſt term, 1801, by Bayard and Ingerſol for the libellant, and Dallas, Maſon, and Levy for the claimant.

For the libellant three points were made.

1. That at the time, and under the circumſtances, the ſhip Amelia was liable to capture by the law, and inſtructions, to ſeize French armed veſſels, for the purpoſe of being brought into port, and ſubmitted to legal adjudication in the courts of the United States.

2. That Captain Talbot, by this capture, ſaved the ſhip Amelia from condemnation in a French court of admiralty.

3. That for this ſervice, upon abſtracted principles of equity and juſtice, according to the law of nations, and the acts of congreſs, the re-captors are entitled to a compenſation for ſalvage.

1. Had captain Talbot a right to ſeize the Amelia, and bring her into port for adjudication?

The acts of congreſs on this ſubject ought all to be conſidered together and in one view. This is the general rule of conſtruction where ſeveral acts are made in pari materiâ. *Plowden*, 206. 1 *Atk.* 457, 458.

The firſt act authorizing captures of French veſſels, is that of 28th May, 1798, *Laws of United States*, *vol.* 4, *p.* 120. The preamble recites that "whereas *armed veſ-* "*ſels ſailing under authority, or pretence of authority, from the* "*republic of France*, have committed depredations on the "commerce of the United States," &c. therefore, it is enacted that the preſident be authorized to inſtruct and direct the commanders of the armed veſſels of the United States "to ſeize, take and bring into any port of the "United States, to be proceeded againſt according to the "laws of nations, any *ſuch* armed veſſel, which ſhall have "committed, or which ſhall be found hovering on the "coaſts of the United States, for the purpoſe of com- "mitting depredations on the veſſels belonging to citi- "zens thereof; and alſo to re-take any ſhip or veſſel of

"any citizen or citizens of the United States, which "may have been captured by any *such* armed veſſel."

The Amelia was "an armed veſſel ſailing under autho- "rity from the republic of France," and if ſhe had committed, or had been found hovering on the coaſt for the purpoſe of committing depredations on the veſſels of the citizens of the United States, ſhe would have been clearly liable to capture under this act of congreſs. This act is entitled "An act *more effectually* to protect the commerce "and coaſts of the United States;" and by it the objects of capture are limited to "armed veſſels ſailing under "authority, or pretence of authority, from the republic "of France, which ſhall have committed, or which ſhall "be found hovering on the coaſts of the United States, "for the purpoſe of committing depredations," &c. It was ſoon perceived that a right of capture, ſo limited, would not afford what the act contemplated, an *effectual* protection to the commerce of the United States. Congreſs, therefore, on the 9th July, 1798, at the ſame ſeſſion, paſſed the "act further to protect the commerce of "the United States," (*Laws United States, vol.* 4. *p.* 163.) and thereby took off the reſtriction of the former act, which limited captures to veſſels having actually committed depredation, or which were hovering on the coaſt for that purpoſe. This act authorizes the capture of any "*armed French veſſel* on the high ſeas," and if the Amelia was ſuch an armed French veſſel as is contemplated by this act, ſhe was liable to capture, and it was the duty of captain Talbot to take her and bring her into port. Another act was paſſed at the ſame ſeſſion, on the 25th June, 1798, (*Laws United States, vol.* 4. *p.* 148.) entitled "An act to authorize the defence of the "merchant veſſels of the United States againſt French "depredations," which, as it conſtitutes a part of that ſyſtem of defence and oppoſition which the legiſlature had in view, ought to be taken into conſideration. It enacts that merchant veſſels of citizens of the United States may oppoſe and defend againſt any ſearch, reſtraint or ſeizure which ſhall be attempted "by the commander "or crew of any armed veſſel *ſailing under French colours,* "*or acting, or pretending to act, by, or under the authority* "*of the French republic,*" and in caſe of attack may repel the ſame, and ſubdue and capture the veſſel. The court

TALBOT v. SEEMAN.

in conſtruing any one of theſe laws will not confine themſelves to the ſtrict letter of that particular law, but will conſider the ſpirit of the times, and the object and intention of the legiſlature. It is evident by the title of the act of July 9th, 1798, and by the general complexion of all the acts of that ſeſſion upon the ſubject, that it was not the intention of congreſs, by the act of July 9th, to reſtrict the caſes of capture contemplated by the act of 28th May, but to enlarge them. The ſpirit of the people was roufed; they demanded a more vigorous and a more effectual oppoſition to the aggreſſions of France, and the ſpirit of congreſs roſe with that of the people. It cannot be ſuppoſed that having in *May* uſed the expreſſion, "armed veſſels ſailing under authority, or "pretence of authority, from the republic of France," and in *June* the expreſſion, "any armed veſſel ſailing "under French colours, or acting, or pretending to act, "by, or under the authority of the French republic," they meant to reſtrict the caſes of capture, in *July*, when they uſed the words "any armed French veſſel." On the contrary, the confidence in the national opinion was increaſed, and further meaſures of defence were adopted, intending not to recede from any thing done before, but to amplify the oppoſition. The act of July was in addition to, not in derogation from, the act of May. Congreſs evidently meant the ſame deſcription of veſſels, in each of thoſe acts. "Armed veſſels ſailing under autho- "rity, or pretence of authority, of France," and "arm- "ed veſſels ſailing under French colours, or acting, or "pretending to act under authority of the French repub- "lic," and "armed French veſſels," muſt be underſtood to be the ſame.

If there is a difference no reaſon can be given for it. A veſſel, in the circumſtances of the Amelia, was as capable of annoying our commerce as if ſhe had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt but ſhe would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hoſtility which congreſs had authorized. Congreſs have the power of declaring war. They may declare a general war, or a partial war. So it may be a general *maritime* war, or a partial maritime war.

TALBOT v. SEEMAN.

This court, in the case of Bass and Tingey, have decided that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the Amelia is a casus belli—whether she was an object of that limited war. The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if congress had authorized the capture of *all French* vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose the Amelia had captured an American, by what nation would the capture be made? by Hamburgh—or by France? There can be no doubt but the injury would be attributed to France. She was under French colours, *armed*, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps it may be said that this proves too much, and that if true, the Amelia must be condemned as prize.—This would be true if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration. It is only necessary now to shew that the capture was so far a lawful act as to be capable of supporting a claim of salvage. At first view she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least for further examination. He had *probable cause*, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of congress.*

* *Bayard.*—What authority is there for American armed vessels to recapture British vessels taken by the French?

TALBOT v. SEEMAN.

The act of July gives no new authority to re-capture American veſſels; it only gives to private armed veſſels the ſame right, which the act of May gives to the public armed veſſels, to make captures and re-captures. But the act of May only authorizes the re-capture of American veſſels, "which may have been captured by any *ſuch* armed veſſel," i. e. by armed veſſels ſailing under authority from the republic of France, and which ſhall have committed, or be found hovering on the coaſts for the purpoſe of committing depredations on our commerce." Yet the inſtructions from the preſident were to re-capture *all* American veſſels. Theſe inſtructions ſhew the opinion of the executive upon the conſtruction of the acts of congreſs, and for that purpoſe they were offered to be read.

The counſel for the claimant objected to their being read, becauſe they were not in the record.

The counſel for the libellant contended they had a right to read them as matter of opinion, but did not offer them as matter of fact.† The court refuſed to hear them.

2. The ſecond point is, that a ſervice was rendered to the owners of the Amelia, by the re-capture, in as much

Chaſe, Juſtice—"Is there any caſe where it has been decided in our "courts that ſuch a re-capture was lawful?"

"It has been ſo decided in the Engliſh courts."

The counſel on both ſides admitted that no ſuch caſe had occurred in this country.

† *Chaſe, Juſtice*—I am againſt reading the inſtructions, becauſe I am againſt bringing the executive into court on any occaſion. It has been decided, as I think, in this court, that inſtructions ſhould not be read.

I think it was in a caſe of inſtructions to the collectors. It was oppoſed by judge Iredell, and the oppoſition acquieſced in by the court.

Paterſon, Juſtice.—The inſtructions can only be evidence of the opinion of the executive, which is not binding upon us.

Marſhall, Chief Juſtice—I have no objection to hearing them, but they will have no influence on my opinion.

Moore, Juſtice.—Mr. Bayard can ſtate all they contain, and they may be conſidered as part of his argument.

Bayard—May I be permitted to read them as a part of my ſpeech?

The Court.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard—I acquieſce in the opinion of the court. My reaſons for wiſhing to read them were, becauſe the opinion of learned men, and men of ſcience, will always have ſome weight with other learned men. And the court would conſider well the opinion of the executive before they would decide contrary to it.

as ſhe was thereby ſaved from condemnation in a French court of admiralty.

To ſupport this poſition, the counſel for the libellant relied on the general ſyſtem of violation of neutral rights adopted by France.

In general caſes, when belligerents reſpect the law of nations, no ſalvage can be claimed for the re-capture of a neutral veſſel, becauſe no ſervice is rendered; but rather a diſſervice, becauſe the captured would, in the courts of the captors, recover damages and coſts, for the illegal capture and detention.

The principle upon which the circuit court decided is not denied; but it is contended that a ſervice was rendered by the re-capture. To ſhew this, the counſel for the libellant offered to read the meſſage from the preſident to both houſes of congreſs, of 4th May, 1798, containing the communications from our envoys extraordinary at Paris, to the department of ſtate, and ſundry arrets and decrees of the government of France, in violation of neutral rights, and of the laws of nations; and particularly the decree of the council of five hundred of 29th Nivoſe, an 6, (Jan. 18, 1798,) which declares, "That "the character of veſſels, relative to their quality of neu- "ter or enemy, ſhall be determined by their cargo; in "conſequence, every veſſel found at ſea, loaded, in whole "or in part, with merchandize the production of England "or of her poſſeſſions, ſhall be declared good prize, who- "ever the owner of theſe goods or merchandize may be."

The counſel for the claimant objected to the reading of thoſe diſpatches, becauſe they were matter of fact. No new fact can be ſhewn on the writ of error. Neither the pleadings, nor the ſtatement of facts accompanying the record, give notice of introducing this new matter. By the *act of congreſs*, *vol.* 1. *p.* 60, 61, a ſtate of the caſe muſt come up with the record; and is concluſive on this court. 3 *Dal.* 321, *Wiſcart v. Dauchy*. *ib. p.* 327, *Ellſworth*, *chief juſtice*, ſaid, a writ of error removes only matter of law. Arrets and decrees of foreign governments, are matters of fact, and muſt be proved as ſuch, and the court can not notice them unleſs ſhewn in the

TALBOT v. SELMAN.

pleadings, admitted or proved. 1. P. Wms. 429, 431. *Freemoult v. Dedire.* Douglas, 557. *Bernardi v. Motteaux.* The ſame caſe in the 2d edition, p. 575 to 579. In that caſe the court could not take notice of the arret of July, 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the ſovereign of the ſtate. Judgment upon a writ of error muſt be upon the ſame facts upon which the judgment below was predicated. 3 *Bl. Com.* 405. *(Williams's edition* 407.) 8. *Term Rep.* 438, 434, 566. If it is matter of law, it is not ſuch law as is binding upon this court, and therefore they cannot officially take notice of it. Foreign laws muſt be proved as facts. 3 *Wooddeſon* 306. 2 *Eq. ca. ab.* 289, 476. 2. *Salk.* 651. *Way v. Yally,* 6 *Mod.* 195. *ſame caſe. Cowp.* 174, 175, *Moſlyn v. Fabrigas.* The law muſt be given in evidence. *Bos. & Pul.* 171, 175, 138. 8 *Term Rep.* 566. Facts cannot be adduced to contradict the record. 8 *Term Rep.* 438. In 2. *Rob.* 126. *(American ed.) the Providentia.* Dr. Scott relied on the king's inſtructions, but that was becauſe the king has the power of war and peace.

A ſtate of the caſe is like a ſpecial verdict; nothing new can be added to it.

In 1. *Rob.* 57. *The Santa Cruz.* Dr. Scott required the ordinances of Portugal to be proved, and evidence of the deciſions of their tribunals upon them.

On the contrary, it was ſaid by the *counſel for the libellant,* that this caſe differs from evidence offered to a jury. In chancery, if evidence is not legal the chancellor will hear it, but will give it no weight. The pamphlet containing the diſpatches is offered to be read, not to ſhew what are the municipal laws of France, but what is the law of nations in France; to ſhew how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi v. Motteux. Doug.* 560 *or* 581. This court is now to decide by the law of nations, not by municipal regu-

lations. All the caſes cited againſt us are caſes in common law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being ſhewn in evidence. 1 *Rob. Engliſh ed.* 341. *American ed.* 287. *The Maria.* and 1 *Rob. Engliſh ed.* 368. *American ed.* 304 *ſame caſe.*

The object in reading theſe diſpatches is to ſhew that the law of nations was not reſpected in France; that the conſtruction of their courts of admiralty was ſuch that their deciſions could not conform to the law of nations; that the law of nations has been ſo modified in France that there was no certainty of indemnity for neutrals, and that by the decrees and arrets of that government, the Amelia would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to congreſs, and publiſhed in conformity to an act of congreſs (4. *vol. p.* 239.) for the information of the citizens of the United States. This act of congreſs has made them proper evidence before this court, who are therefore bound to notice them. On the ſubject of admitting foreign ordinances in a court of admiralty no difficulty ever occured. The objections are only to private municipal regulations. Such, it is admitted, muſt be proved as facts, but not when they are offered as explaining the law of nations. *In* 1 *Rob. American ed.* 288. *(The Maria.)* this very decree is cited; and it is immaterial to us whether we read it out of the diſpatches or out of the book which the oppoſite counſel have already cited for other purpoſes. By the ſame rule that they read pages 57 and 126, we may ſurely read page 288.

On the part of the claimant it was replied,

That this decree is not an act of congreſs, nor the law of nations, but ſimply a law of France. The record is confined to the facts which originally came up with the writ of error, or ſuch as may afterwards be procured upon a ſuggeſtion of diminution. It is admitted that in equity, on an appeal to the houſe of lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that

TALBOT v. SEEMAN.

court was bound to notice. In the cases cited by the opposite counsel the arrets were read by consent. A common law court is as much bound as a court of admiralty to take notice of the law of nations, on a question where that law applies; and the rules by which common law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty.

The court suffered the dispatches, and decrees of France, to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the libellant proceeded in the argument on the 2d point.

The decree of 18th of January, 1798, was not repealed till the 14th of December, 1799, and consequently was in full force at the time of the capture on the 6th of September, 1799. The facts stated in the appendix to 2d vol. of Robertson's reports, shew that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct that sir William Scott makes it the ground of his decision in various cases.

It is not necessary to shew that the Amelia would certainly have been condemned. To entitle to salvage it is only necessary to shew that she was in a better condition by the re-capture. Her cargo was the production of the possessions of England, and therefore by the decree of 18th January, 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir William Scott a good ground for salvage. 1 *Rob.* 232. *(The Two Friends)* 2 *Rob.* 246. *(The War Onskan.)*

3dly. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of congress of the 2d of March, 1799, entitled "an act for the government of "the navy of the United States," §. 7. vol. 4. p. 472. by

which it is enacted "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if re-taken from the *enemy* within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c. and if after ninety-six hours, one half; all of which is to be paid without any deduction whatsoever."

In the case of *Bass and Tingey* it was decided by this court that France was to be considered as an enemy. The case of the Amelia comes within the very words of this act of congress. She is a ship belonging to citizens of a nation in amity with the United States, re-taken from the enemy after a possession of ninety-six hours.

By the *act of congress of 25th June*, 1798, *vol.* 4. *p.* 149, 150. property of American citizens, re-captured by armed merchant vessels, is to be restored on the payment of not less than one-eighth, and not more than one-half for salvage. And by *the act of 3d March*, 1800, not less than one-sixth is allowed on re-capture by a private armed vessel, and one-eighth by a public ship of war.

If then the re-capture of this vessel was a lawful act, and if service was rendered thereby to the owners, the re-captors are entitled to salvage, and the rate of that salvage is by the act of congress fixed at one-half of the value of the ship and cargo.

On the part of the claimant it was said, that if France and America were at peace, the re-capture was not authorized by the law of nations. The claim of salvage must rest on two grounds.

1. A right to interfere.

2. A benefit conferred on the owners.

1. It is admitted that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may be the motive or intent of such possession. 2 *Wooddeson*

TALBOT v. SEEMAN.

424. The belligerent has a lawful right to ſearch merchant veſſels, and this right cannot be conſidered as injurious to the fair neutral trader. Reſiſtance to ſuch ſearch is unlawful, and ſuch reſiſtance, a reſcue, or an eſcape, are ſufficient cauſes to condemn the neutral veſſel. *Vattel. B.* 3. *c.* 7. §. 114. *p.* 507. 1 *Rob.* 304. *(The Maria.)*

The act of the re-captor's, then being in aid of the unlawful reſiſtance of the neutral, muſt in itſelf be illegal. The courts of the captors only are competent to decide the queſtion of prize or no prize. American citizens have no right to interfere, and wreſt the neutral veſſel from the poſſeſſion of the belligerent.

The French have been repreſented as pirates, *hoſtes humani generis*. But if France has waged ſo general a war on neutral property, has not England done the ſame?

We find in *their* courts, that when a benefit is to accrue to Britiſh ſubjects, by ſuch a deciſion, they decide that France muſt be preſumed to reſpect the law of nations and to decree reſtitution; 1 *Rob.* 84, 85. *(The Betſey.)* 7 *Term Rep.* 695. *Geyer v. Aquilar;* but when ſalvage is to be given to Britiſh re-captors of neutral property, then it appears that Frrnce has loſt all regard for the law of nations, and there is no chance of eſcape from her courts of admiralty. 1 *Rob.* 232. *(The Two Friends.)* 2 *Rob.* 246. *(The War Onſkan.)*.

But it is contended that the courts of France would have decided according to the decree of 18th January, 1798, and not according to the law of nations. This is not to be preſumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unleſs ſhe herſelf is injured, or her property or rights are affected; and even then individuals cannot act. The injury muſt be redreſſed by the government in the way of negociation or war. What was the conduct of our government in ſuch a caſe? It firſt choſe to negociate, and then to prepare for war. At the time the negociation was begun, all the injurious decrees were in force, full in the view of the legiſlature, who authorized certain meaſures of hoſtility: but no citizen could

go one ſtep beyond what was authorized. The liability of the Amelia to condemnation in a French court of admiralty, created no right in captain Talbot to capture her, even if that condemnation was certain. But the facts of this caſe do not warrant ſuch a concluſion. The fact ſtated is that "the ſhip Amelia ſailed from *Calcutta in* "*Bengal* in the month of April, 1799, loaded with a car- "go of the product and manufactory of *that country*." What country? *Bengal*; but Bengal is not ſtated to be one of the poſſeſſions of England. Not long ſince the province of Bengal was in poſſeſſion of ſovereign princes; but it does not appear how far they have been ſubdued by the Engliſh. It is true that the libel ſpeaks of Calcutta as being an Engliſh port in the Eaſt-Indies, but it does not follow that the whole country of Bengal has been ſubjected to the Britiſh power. Beſides it is not the port from whence the veſſel ſails which taints the cargo, but its quality, as being the production of an Engliſh poſſeſſion. Hence it does not appear that the Amelia was liable to condemnation under the decree of 18th January, 1798, and we cannot preſume that ſhe would have been condemned. The French captors did not pretend ſhe was liable under that decree, but ſent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a ſtate of war; and there being no fact ſtated to the contrary, we are to ſuppoſe that ſhe would have been ſo judged, and not otherwiſe. To have interfered on our part to prevent this would have been a juſt cauſe of hoſtilities againſt us. No citizen ought to be allowed to come into our courts to claim a reward for an act which hazards the peace of the country.

If benefit be the criterion of ſalvage, then the greater the ſervice, the greater ought to be the ſalvage. But if the conſtruction, given by the oppoſite couſel, to the act of 2d March, 1799, be correct, then the ſame ſalvage is due for the re-capture of a clear neutral, as of a belligerent. And yet in common wars no ſalvage at all is due for the re-capture of a neutral.

Every neutral nation has a right to chooſe her own manner of redreſs. We have no right to interfere, or to decide how far her veſſels are liable to condemnation under French decrees. She may be willing to truſt to the

TALBOT v. SEEMAN.

chances of acquittal or indemnification. We have no right to legiſlate upon the property of a foreign independent nation, and to ſay that we will, whether you conſent or not, reſcue your veſſels from the French, and then make you pay us ſalvage. *Vattel. B.* 2. *ch.* 1. §. 7. *p.* 123. If an act, intended ſolely for my benefit, is advantageous to another, I am not entitled to reward. 2 *Rob.* 23, 24. *(The Vryheid.)* In order to ground a claim of ſalvage, the danger of the property muſt have been not hypothetical, but abſolute; not diſtant and uncertain, but immediate and imminent: the act of ſaving muſt have been done with that ſole intent, and muſt have been attended with labour, loſs, expenſe or hazard to the ſalvor. The Amelia was taken by captain Tabot, and libelled as a *French* veſſel; his object was not to ſave a neutral, but to capture a belligerent. Under ſuch a miſtake he might have a right to examine her further, but the moment ſhe proved to be neutral property he ought to have releaſed her. His miſtake can be no ground for a claim of ſalvage. It is a mere juſtification of an act of force, and as ſuch may ſave him from the payment of damages and coſts. In this caſe there was no danger to the property, no trouble in ſaving it, nor any intention to benefit the owners. In *Beawes Lex. mer. vol.* 1. *p.* 158, it is ſaid that to ſupport a claim of ſalvage, the veſſel muſt be in evident hazard, and muſt be ſaved by means uſed with that ſole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows ſalvage to one belligerent taking from another the property of a neutral? By the ſtate of the caſe this veſſel was neutral as to all the belligerent powers. If the captor had applied for her, ſhe muſt have been given up, upon the authority of the caſe of *Gloſs and Gibbs*, 3 *Dal.* 6. without any compenſation for re-capture. Among the caſes cited, the only one againſt us is 2 *Rob.* 246. *(The War Onſkan.)* In that caſe ſir William Scott ſays, that "*lately*" it has been the practice of his court to give ſalvage on re-capture of neutral property out of the *hands of the French;* but that ſuch is not the modern practice of the law of nations; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no eſſential ſervice rendered to him; in as much as that ſame enemy would be

compelled by the tribunals of his own country, after he had carried the neutral into port, to releaſe him with coſts and damages for the injurious ſeizure and detention. But in that very caſe, however, we ſee that he might ſhortly change his courſe of deciſions on that ſubject, ſo that very probably, had that caſe been decided in the next term, it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of ſuch departure he may poſſeſs. There will be a variance in the deciſions of the lower courts; it ſhould, therefore, be put upon ſuch a footing as to make it clear and plain to all the judges of the inferior courts. This deciſion of ſir William Scott is a creature of his own, which he himſelf promiſes to change when the ſituation of affairs will allow.

Sir William Scott gives ſalvage expreſsly on the ground of ſervice rendered, on account of the kind of hoſtility which France exerciſed towards neutrals. But in this caſe the ſtatement of facts excludes the idea of hoſtility between France and Hamburgh. The law of nations gave no right to re-capture. The authority under the acts of congreſs muſt be conſtrued ſtrictly, and confined to their expreſs proviſions. Neither the executive, nor individuals, nor the courts have a right to alter them.

So far as war is not authorized by congreſs there is peace. It was not contemplated by any act of congreſs that our veſſels ſhould capture Hamburgh veſſels. The miſchief to be remedied by the act of May was that the ſmall armed veſſels of France were hovering on our coaſts and taking our veſſels almoſt in our ports. The act of congreſs has completely met the evil, by authorizing the capture of ſuch French veſſels as had taken, or were found hovering for the purpoſe of taking our veſſels. This act, therefore, does not authorize the capture of a Hamburgh veſſel. There is no law which authorizes a capture for two purpoſes, viz. to be condemned as a French veſſel or to be ſubjected to ſalvage as a neutral. The Amelia was not navigating under the authority, or pretended authority of France. She was engaged in a lawful trade. But if the Freneh took poſſeſſion of her under ſuſpicion of unlawful trade, that gave us no au-

TALBOT v. SEEMAN.

thority to take her from the poſſeſſion of France, the property, under the law of nations, not being changed. The taking being unlawful can ſupport no claim of ſalvage.

The act of July, 1798, authorizes only the capture of armed French veſſels, and confines the caſes of recapture to the ſhips or goods of citizens or *reſidents* of the United States. The capture can only be juſtified by the doubtful character of the veſſel, and as ſoon as that was known to be neutral, capt. Talbot ought to have diſmiſſed her; the detention afterwards was unlawful and will not juſtify a decree for ſalvage. This veſſel, it is true, might have been uſed to diſtreſs our commerce, and this might poſſibly be an excuſe for detaining her, or even diſmantling her, but will not entitle him to ſalvage.

If this veſſel was lawful prize to France, then France has a claim for indemnity; but as ſhe has made no claim we muſt preſume the veſſel would have been reſtored by her to the owners.

The act of congreſs of *March* 2, 1799, upon which the counſel for the libellant rely, does not contemplate a caſe like the preſent. That is a permanent law, not made for the preſent war only, but intended to apply to all future wars. It could not therefore intend to give ſalvage on the recapture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given this war, for the firſt time, only on account of the conduct of France towards neutrals, and will ceaſe when that conduct ſhall be altered. Beſides, it would give the ſame reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy" in the 7th ſection of that act, means the enemy of us and our ally whoſe veſſel is re-captured by our armed veſſels—and not *our* enemy who is the friend of our ally. If then this is not a ſtatutory caſe of ſalvage, we muſt recur to the queſtion of benefit. In the court below they relied wholly on the act of congreſs. Not a word was ſaid reſpecting the ſervice rendered. Let us then conſider the claim of *quantum meruit*. To ſupport this, there muſt be,

1. A lawful consideration, and

2. A contract express or implied.

To make the consideration lawful, it must be permitted by law; *a fortiori* it must not be contrary to law.

It is not authorized by our law to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country.

It is not alledged that there was any express contract; and a contract cannot be implied, because the intent with which she was taken, viz. to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised on the retaining her, because that was a state of duress, which cannot be made the ground of a reward.

But if this case is to be considered upon a quantum meruit, then the amount of salvage must depend upon the danger and the exertion. 1. *Rob.* 151. *(The St. Bernardo,)* and 1. *Rob.* 240. *(The Two Friends.)* It is said that in cases of unauthorized capture or re-capture, the property goes to the crown; 2. *Rob.* 45. *(The Princessa,)* and it is sometimes referred to the court to fix the reward of the captors. It follows then that the property goes to the government, and they alone can fix the reward. But our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree, and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth 94,000 dollars; the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward.

The decree of France might be only *in terrorem*, and so no danger. If the Amelia was not liable to condemnation in the French courts, then no service was rendered, and consequently no salvage ought to be allowed.

TALBOT v. SEEMAN.

But if she was liable to condemnation, then the recapture is a violation of the rights of France.

If France violates the laws of nations, it is no justification of a violation of them on our part. An illegal power to take, given by France to her cruizers, does not authorize us to re-take.

In the case of Bass v. Tingey, *Feb. term*, 1800, *in the supreme court of the United States*, the reasoning of the court seems to admit that the act of 2d March, 1799, will not apply, in the present state of hostilities, to recaptures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful re-capture of a neutral from the hand of a belligerent.

Judge Moore, in delivering his opinion in that case says, "It is however more particularly urged, that the word "*enemy*" can not be applied to the French; because the "section, in which it is used, is confined to such a state "of war, as would authorize a re-capture of property be"longing to a nation in *amity* with the United States, and "*such a state of war does not exist between America and* "*France*. A number of books have been cited to furnish "a glossary on the word *enemy*; yet, our situation is so "extraordinary, that I doubt whether a parallel case "can be traced in the history of nations. But if words "are the representatives of ideas, let me ask by what "other word the idea of the relative situation of America "and France could be communicated, than by that of "*hostility* or *war*? And how can the characters of the "parties engaged in hostility or war, be otherwise de"scribed than by the denomination of "*enemies*." It is "for the honor and dignity of both nations, therefore, "that they should be called enemies; for it is by that "description alone, that either could justify or excuse, the "scene of bloodshed, depredation and confiscation, which "has unhappily occurred; and, surely, congress could "only employ the language of the act of June 13, 1798, "towards a nation whom she considered as an enemy."

"Nor does it follow that the act of March, 1799, is "to have no operation, because all the cases in which it

" might operate, *are not in exiſtence* at the time of paſſing " it. During the preſent hoſtilities, it affects the caſe " of re-captured property belonging to *our own citizens*, " and in the event of a *future war* it might alſo be ap- " plied to the caſe of re-captured property belonging to " a *nation in amity with the United States.*

And in the ſame caſe, Judge Waſhington obſerved, " that hoſtilities may ſubſiſt between two nations, more " confined in its nature and extent; being limited as to " places, perſons and things; and this is more properly " termed *imperfect* war; becauſe not *ſolemn, and becauſe* " *thoſe who are authorized to commit hoſtilities, act under* " *ſpecial authority, and can go no further than to the extent* " *of their commiſſion.*" And again he ſays, " It has like- " wiſe been ſaid that the 7th ſection of the act of March, " 1799, embraces caſes which according to pre-exiſting " laws, could not then take place, becauſe no authority " had been given to re-capture friendly veſſels from the " French, and this argument was ſtrongly and forcibly " preſſed.

" But becauſe every caſe provided for by this law *was* " *not then exiſting*, it does not follow that the law ſhould " not operate upon ſuch as did exiſt, *and upon the reſt* " *whenever they ſhould ariſe.* It is a permanent law em- " bracing a variety of ſubjects; not made in relation to " the preſent war with France only, but in relation to " any future war with her, or with any other nation. It " might then very properly allow ſalvage for re-capturing " of *American* veſſels from France, which had previouſly " been authorized by law, though it could not *immedi-* " *ately* apply to the veſſels of *friends*; and whenever ſuch " a war ſhould exiſt between the United States and France, " or any other nation, as, according to the law of nations, " or ſpecial authority, would *juſtify the re-capture of friend-* " *ly veſſels*, it *might on that event*, with ſimilar propriety, " apply to them; which furniſhes, I think, the true con- " ſtruction of the act."

" The opinion which I delivered at New-York, in " *Talbot v. Seeman*, was, that although an American veſ- " ſel could not juſtify the taking of a neutral veſſel from " the French, becauſe neither the ſort of war that ſub-

TALBOT v. SEEMAN.

"sisted, nor the special commission under which the Ame-
"rican acted, authorized the proceeding; yet that the
"7th section of the act of 179 , applied to re-captures
"from France, *as an enemy, in all cases authorized by con-*
"*gress*. And on both points my opinion remains un-
"shaken; or rather has been confirmed by the very able
"discussion which the subject has lately undergone in
"this court, on the appeal from my decree."*

Similar sentiments were also expressed by Judge Chase and Judge Paterson in the same case. From these opinions it seems clearly to result that the act of March 2d 1799, can not be the rule of salvage in this case.

On the part of the libellant it was stated in reply, as to the admissibility of the dispatches from the American envoys, and the French arret of 18th January, 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1. *Dal.* 364. *Loft.* 631. *Doug.* 619. 622. 649. 650. 554. The opposite counsel have cited and relied on Robertson's reports to shew what was the ancient law of France, and surely we have as good a right to cite the same book to shew what is the present law of France. In 1 *Rob.* 288. *(The Maria,)* this arret of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to shew that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it.

The case in P. Williams refers to a municipal law which had no connection with the law of nations. The same observation applies to the cases from 6 *Mod. and* 2 *Salk.* No case can be produced where a law of a foreign country, authenticated as this is, by an act of the legislature of our country, has been refused to be considered by a court.

* This case of Talbot v. Seeman, was argued once before, in this court, at Philadelphia.

As to the objection that the cargo does not appear to be the production of England or her poſſeſſions, becauſe there is no evidence that the whole of the province of Bengal has been ſubjected to the dominion of England; it may be ſufficient to obſerve, that the libel and anſwer admit Calcutta to be an Engliſh port, and the caſe ſtated ſays, the veſſel ſailed from Calcutta in Bengal, loaded with a cargo of the product and manufactory of *that country*. It being admitted that Calcutta is an Engliſh port, and that the cargo was the production of that country, it follows, unleſs the contrary is clearly ſhewn in evidence, that the cargo was the product of an Engliſh poſſeſſion.

It is ſaid that there is no evidence that France carried her unjuſt decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world. Congreſs have expreſsly declared it in the preambles of their acts. The whole ſyſtem of hoſtility is founded upon it, and can be juſtified on no other ground. They have further declared it by ordering the diſpatches to be publiſhed and diſtributed among the citizens of the United States, for their information. It would be ſtrange if this court ſitting here as a court of the law of nations to try a cauſe in which all the world are parties, ſhould be the only perſons in the world ignorant of the fact.

The general principle is admitted that ſalvage is not due for the re-capture of a neutral from a belligerent, and for this reaſon that by the law of nations the neutral would be reſtored by the captor with damages and coſts. But *ceſſante ratione, ceſſat lex*. And it follows by powerful inference that if the captor would not have reſtored the neutral with damages and coſts, ſalvage ought to be allowed. To bring the Amelia within this inference, it is only neceſſary to ſhew that ſhe would not have been reſtored with damages and coſts. If the court ſhould take into conſideration the arret of 18th January, 1798, and the fact that the cargo was the production of an Engliſh poſſeſſion, there is no doubt but, inſtead of being reſtored with damages and coſts, ſhe would have been condemned and totally loſt to the owners. Is no ſalvage due for ſo certain and ſo ſignal a benefit?

TALBOT v. SEEMAN.

It is said that unless salvage is expresly given by the act of congress, it can only be claimed upon a contract, either express, or implied. This is not the case. The claim of salvage upon re-capture never is supposed to arise *ex contractu*. It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labour or hazard of the re-captor, nor by his intention to confer a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. *Woodeson*, 423. In 1 *Rob.* 234. 235. (*The Two Friends,*) the rule of salvage on rescue is said to be *quantum meruit*. And in the same case, *p.* 232, sir W. Scott says, "It has been slightly questioned in the act of court, "(which contains the exposition of facts given by both "parties) whether there was such a state of hostilities be- "tween America and France as to raise a title of salvage "for American goods retaken from the French. But "this point has not been pursued in argument; and in- "deed I should wonder if it had, after the determinations "of this court, which have in various instances, decreed "salvage in similar cases. It is not for me to say whe- "ther America is at war with France, or not; but the "conduct of France towards America has been such *de* "*facto*, as to induce American owners to acknowledge "the services by which they have recovered their ships "and cargoes out of the hands of French cruizers by "force of arms."

In the case of *Bas & Tingey*, the question was not argued, whether salvage could be claimed upon the re-capture of a neutral, on the ground of benefit rendered; and therefore the opinion of the court in that case does not militate with our claim.

August 11th. *Marshall*, *Chief Justice*, delivered the opinion of the court.

This is a writ of error to a decree of the circuit court for the district of New-York, by which the decree of the district court of that state, restoring the ship Amelia to her owner on the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

The facts agreed by the parties, and the pleadings in the cauſe, preſent the following caſe:

The ſhip Amelia ſailed from Calcutta in Bengal, in April, 1799, loaded with a cargo of the product and manufactory of that country, and was bound to Hamburgh. On the 6th September ſhe was captured by the French national corvette La Diligente, commanded by L. J. Dubois, who took out the captain, part of the crew, and moſt of the papers of the Amelia, and putting a prize maſter and French ſailors on board her, ordered her to St. Domingo to be judged according to the laws of war.

On the 15th of September ſhe was re-captured by captain Talbot, commander of the Conſtitution, who ordered her into New-York for adjudication.

At the time of the re-capture, the Amelia had eight iron cannon, and eight wooden guns, with which ſhe left Calcutta. From the ſhips papers, and other teſtimony, it appeared that ſhe was the property of Chapeau Rouge, a citizen and merchant of Hamburgh; and it was conceded by the council below, that France and Hamburgh were not in a ſtate of hoſtility with each other, and that Hamburgh was to be conſidered as neutral between the preſent belligerent powers.

The diſtrict court of New-York, before whom the cauſe firſt came, decreed one-half of the groſs amount of the ſhip and cargo as ſalvage to the re-captors. The circuit court of New-York reverſed this decree, from which reverſal, the re-captors appealed to this court.

The Amelia was libelled as a French veſſel, and the libellant prays that ſhe may be condemned as prize; or, if reſtored to any perſon entitled to her as the former owner, that ſuch reſtoration ſhould be made on paying ſalvage. The claim and anſwer of Hans Frederick Seeman, diſcloſes the neutral character of the veſſel, and claims her on behalf of the owners.

The queſtions growing out of theſe facts, and to be decided by the court, are—

TALBOT v. SEEMAN.

Is captain Talbot, the plaintiff in error, entitled to any, and if to any, to what ſalvage in the caſe which has been ſtated?

Salvage is a compenſation for actual ſervice rendered to the property charged with it.

It is demandable of right for veſſels ſaved from pirates, or from the enemy.

In order, however, to ſupport the demand, two circumſtances muſt concur.

1ſt. The taking muſt be lawful.

2d. There muſt be a meritorious ſervice rendered to the re-captured.

1ſt. The taking muſt be lawful—for no claim can be maintained in a court of juſtice, founded on an act in itſelf tortious. On a re-capture, therefore, made by a neutral power, no claim for ſalvage can ariſe, becauſe the act of re-taking is a hoſtile act, not juſtified by the ſituation of the nation to which the veſſel making the re-capture belongs, in relation to that from the poſſeſſion of which ſuch re-captured veſſel was taken. The degree of ſervice rendered the reſcued veſſel is preciſely the ſame as if it had been rendered by a belligerent; yet the rights accruing to the re-captor are not the ſame, becauſe no right can accrue from an act in itſelf unlawful.

In order then to decide on the right of captain Talbot it becomes neceſſary to examine the relative ſituation of the United States and France at the date of the re-capture

The whole powers of war being, by the conſtitution of the United States, veſted in congreſs, the acts of that body can alone be reſorted to as our guides in this enquiry. It is not denied, nor in the courſe of the argument has it been denied, that congreſs may authorize general hoſtilities, in which caſe the general laws of war apply to our ſituation; or partial hoſtilities, in which caſe the laws of war, ſo far as they actually apply to our ſituation, muſt be noticed.

To determine the real ſituation of America in regard to France, the acts of congreſs are to be inſpected.

The firſt act on this ſubject paſſed on the 28th of May, 1798, and is entitled "An act more effectually to protect the commerce and coaſts of the United States."

This act authorizes any armed veſſel of the United States to capture any armed veſſel ſailing under the authority, or pretence of authority, of the republic of France, which ſhall have committed depredations on veſſels belonging to the citizens of the United States, or which ſhall be found hovering on the coaſts for the purpoſe of committing ſuch depredations. It alſo authorizes the re-capture of veſſels belonging to the citizens of the United States.

On the 25th of June, 1798, an act was paſſed "to authorize the defence of the merchant veſſels of the United States againſt French depredations."

This act empowers merchant veſſels, owned wholly by citizens of the United States, to defend themſelves againſt any attack which may be made on them by the commander or crew of any armed veſſel ſailing under French colours, or acting, or pretending to act, by or under the authority of the French republic; and to capture any ſuch veſſel. This act alſo authorizes the re capture of merchant veſſels belonging to the citizens of the United States. By the 2d ſection, ſuch armed veſſel is to be brought in and condemned for the uſe of the owners and captors.

By the ſame ſection, re-captured veſſels belonging to the citizens of the United States, are to be reſtored, they paying for ſalvage not leſs than one-eighth nor more than one-half of the true value of ſuch veſſel and cargo.

On the 28th of June, an act paſſed "in addition to the act more effectually to protect the commerce and coaſts of the United States."

This authorizes the condemnation of veſſels brought in under the firſt act, with their cargoes, excepting only from ſuch condemnation the goods of any citizen or perſon re-

TALBOT v. SEEMAN.

fident within the United States, which ſhall have been before taken by the crew of ſuch captured veſſel.

The ſecond ſection provides that whenever any veſſel or goods the property of any citizen of the United States or perſon reſident therein, ſhall be re-captured, the ſame ſhall be reſtored, he paying for ſalvage one-eighth part of the value, free from all deductions.

On the 9th of July another law was enacted, "further to protect the commerce of the United States."

This act authorizes the public armed veſſels of the United States to take any armed French veſſel found on the high ſeas. It alſo directs ſuch armed veſſel, with her apparel, guns, &c. and the goods and effects found on board, being French property, to be condemned as forfeited.

The ſame power of capture is extended to private armed veſſels.

The 6th ſection provides, that the veſſel or goods of any citizen of the United States, or perſon reſiding therein, ſhall be reſtored, on paying for ſalvage not leſs than one eighth, nor more than one half, of the value of ſuch re-capture, without any deduction.

The 7th ſection of the act for the government of the navy, paſſed the 2d of March, 1799, enacts, "That for the ſhips or goods belonging to the citizens of the United States, or to the citizens or ſubjects of any nation in amity with the United States, if re-taken within twenty-four hours, the owners are to allow one eighth part of the whole value for ſalvage," and if they have remained above ninety-ſix hours in poſſeſſion of the enemy, one half is to be allowed.

On the 3d of March 1800, congreſs paſſed "an act providing for ſalvage in caſes of re-capture."

This law regulates the ſalvage to be paid "when any veſſels or goods, which ſhall be taken as prize as aforeſaid, ſhall appear to have before belonged to any perſon or per-

ſons permanently reſident within the territory and under the protection of any foreign prince, government or ſtate, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretence of authority from any prince, government, or ſtate, againſt which the United States have authoriſed, or ſhall authoriſe defence or repriſals."

Theſe are the laws of the United States, which define their ſituation in regard to France, and which regulate ſalvage to accrue on re-captures made in conſequence of that ſituation.

A neutral armed veſſel which has been captured, and which is commanded and manned by Frenchmen, whether found cruizing on the high ſeas, or ſailing directly for a French port, does not come within the deſcription of thoſe which the laws authoriſe an American ſhip of war to capture, unleſs ſhe be conſidered quoad hoc as a French veſſel.

Very little doubt can be entertained but that a veſſel thus circumſtanced, encountering an American unarmed merchantman, or one which ſhould be armed, but of inferior force, would as readily capture ſuch merchantman as if ſhe had ſailed immediately from the ports of France. One direct and declared object of the war then, which was the protection of the American commerce, would as certainly require the capture of ſuch a veſſel as of others more determinately ſpecified. But the rights of a neutral veſſel, which the government of the United States cannot be conſidered as having diſregarded, here intervene; and the veſſel certainly is not, correctly ſpeaking, a French veſſel.

If the Amelia was not, on the 15th September 1799, a French veſſel within the deſcription of the act of congreſs, could her capture be lawful?

It is, I believe, a univerſal principle, which applies to thoſe engaged in a partial, as well as thoſe engaged in a general war, that where there is probable cauſe to believe the veſſel met with at ſea, is in the condition of one

TALBOT v. SEEMAN.

liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts.

The Amelia was an armed vessel commanded and manned by Frenchmen. It does not appear that there was evidence on board to ascertain her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication.

The re-capture then was lawful.

But it has been insisted that this re-capture was only lawful in consequence of the doubtful character of the Amelia, and that no right of salvage can accrue from an act which was founded in mistake, and which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case.

The opinion of the court is, that had the character of the Amelia been completely ascertained by capt. Talbot, yet as she was an armed vessel under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief.—To have taken out the arms of the crew, was as little authorized by the construction of the act of congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practised in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed so as to become a French vessel, and yet it would probably have been a great departure from the real intent of congress, to have permitted such vessel to cruise unmolested. An armed ship under these circumstances might have attacked one of the public vessels of the United States. The acts which have been recited expresly authorise the capture of such vessel so commencing hostilities, by a private armed ship, but not by one belonging to the public. To suppose that a capture would in one case be lawful, and in the other unlawful; or to suppose that even in the limited state of hostilities in which we were placed, two

veſſels armed and manned by the enemy, and equally cruizing on American commerce, might the one be lawfully captured, while the other, though an actual aſſailant, could not, or if captured, that the act could only be juſtified from the probable cauſe of capture furniſhed by appearances; would be to attribute a capriciouſneſs to our legiſlation on the ſubject of war, which can only be proper when inevitable.

There muſt then be incidents growing out of thoſe acts of hoſtility ſpecifically authoriſed, which a fair conſtruction of the acts will authorize likewiſe.

This was obviouſly the ſenſe of congreſs.

If by the laws of congreſs on this ſubject, that body ſhall appear to have legiſlated upon a perfect conviction that the ſtate of war in which this country was placed, was ſuch as to authorize re-captures generally from the enemy; if one part of the ſyſtem ſhall be manifeſtly founded on this conſtruction of the other part, it would have conſiderable weight in rendering certain what might before have been doubtful.

Upon a critical inveſtigation of the acts of congreſs it will appear, that the right of re-capture is expreſsly given in no ſingle inſtance, but that of a veſſel or goods belonging to a citizen of the United States.

It will alſo appear that the quantum of ſalvage is regulated, as if the right to it exiſted previous to the regulation.

Although no right of re-capture is given in terms for the veſſels and goods belonging to perſons reſiding within the United States not being citizens, yet an act, paſſed ſo early as the 28th of June 1798, declares, that veſſels and goods of this deſcription, when re captured, ſhall be reſtored on paying ſalvage; thereby plainly indicating that ſuch re-capture was ſufficiently warranted by law to be the foundation of a claim for ſalvage.

If the re-capture of veſſels of one deſcription, not expreſsly authorized by the very terms of the act of congreſs

TALBOT v. SEEMAN.

be yet a rightful act, recognized by congress as the foundation for a claim to salvage, which claim congress proceeds to regulate, then it would seem that other re-captures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by congress, such claim must be determined by the principles of general law.

In this situation remained the re-captured vessels of any other power also at war with France, until the act of the 2d of March, 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given in terms, to re-capture such vessels. But their re-capture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize, the vessel of such a power, the prize was inevitably re-captured. On the idea that the re-capture was lawful and that it was a foundation on which the right to salvage could stand, the legislature in March 1799, declare what the amount of that salvage should be.

The expression of this act is by no means explicit. If it extends to neutrals then it governs in this case; if otherwise, the law respecting them continued still longer on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March, 1799. Thus it continued until the 3d of March 1800, when the legislature regulated the salvage to be paid by neutrals, re-captured from a power against which the United States have authorized defence or reprisals.

This act having passed subsequent to the re-capture of the Amelia, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like manner with the laws already commented on, the system which congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed, and which it was deemed necessary to continue, till the negotiation then pending should have a pacific termination. Accordingly there is no expression in the act ex-

tending the power of re-capture, or giving it in the caſe of neutrals. This power is ſuppoſed to exiſt as an incident growing out of the ſtate of war, and the right to ſalvage produced by that power is regulated in the act.

In caſe of a re-capture ſubſequent to the act, no doubt could be entertained, but that ſalvage, according to its terms, would be demandable. Yet there is not a ſyllable in it which would warrant an idea that the right of re-capture was extended by it, or did not exiſt before.

It muſt then have exiſted from the paſſage of the laws, which commenced a general reſiſtance to the aggreſſions we had ſo long experienced and ſubmitted to.

It is not unworthy of notice that the firſt regulation of the right of ſalvage in the caſe of a re-capture, not expreſsly enumerated among the ſpecified acts of hoſtility warranted by the law, is to be found in one of thoſe acts which conſtitute a part of the very ſyſtem of defence determined on by congreſs, and is the firſt which ſubjects to condemnation the prizes made by our public ſhips of war.

It has not eſcaped the conſideration of the court that a legiſlative act, founded on a miſtaken opinion of what was law, does not change the actual ſtate of the law as to pre-exiſting caſes.

This principle is not ſhaken by the opinion now given. The court goes no further than to uſe the proviſions in one of ſeveral acts forming a general ſyſtem, as explanatory of other parts of the ſame ſyſtem; and this appears to be in obedience to the beſt eſtabliſhed rules of expoſition, and to be neceſſary to a ſound conſtruction of the law.

An objection was made to the claim of ſalvage by one of the counſel for the defendant in error, unconnected with the acts of congreſs, and which it is proper here to notice.

He ſtates that to give title to ſalvage the means uſed muſt not only have produced the benefit, but muſt have

TALBOT v. SEEMAN.

been uſed with that ſole view. For this he cites Beawes lex mercatoria 158.

The principle is applied by Beawes to the ſingle caſe of a veſſel ſaved at ſea by throwing overboard a part of her cargo. In that caſe the principle is unqueſtionably correct, and in the caſe of a re-capture it is as unqueſtionably incorrect. The re-captor is ſeldom actuated by the ſole view of ſaving the veſſel, and in no caſe of the ſort has the enquiry ever been made.

It is then the opinion of the court on a conſideration of the acts of congreſs, and of the circumſtances of the caſe, that the re-capture of the Amelia was lawful, and that, if the claim to ſalvage be in other reſpects well founded, there is nothing to defeat it in the character of the original taking.

It becomes then neceſſary to enquire—

2d. Whether there has been ſuch a meritorious ſervice rendered to the re-captured as entitles the re-captor to ſalvage.

The Amelia was a neutral ſhip, captured by a French cruizer, and re-captured while on her way to a French port, to be adjudged according to the laws of war.

It is ſtated to be the ſettled doctrine of the law of nations, that a neutral veſſel captured by a belligerent is to be diſcharged without paying ſalvage: and for this ſeveral authorities have been quoted, and many more might certainly be cited. That ſuch has been a general rule is not to be queſtioned. As little is it to be queſtioned that this rule is founded excluſively on the ſuppoſed ſafety of the neutral. It is expreſsly ſtated in the caſe of the *War Onſkan*, cited from Robinſon's reports, to be founded on this plain principle, "that the liberation of a clear neutral from the hand of the enemy, is no eſſential ſervice rendered to him, in as much as that the ſame enemy would be compelled by the tribunals of his own country after he had carried the neutral into port, to releaſe him with coſts and damages for the injurious ſeizure and detention." It is not unfrequent to conſider and ſpeak of a

regular practice under a rule, as itſelf forming a rule. A regular courſe of deciſions on the text of the law, conſtitutes a rule of conſtruction by which that text is to be applied to all ſimilar caſes: But alter the text, and the rule no longer governs. So in the caſe of ſalvage. The general principle is, that ſalvage is only payable where a meritorious ſervice has been rendered. In the application of this principle, it has been decided that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not therefore to pay ſalvage.

The principle is that without benefit, ſalvage is not payable: and it is merely a conſequence from this principle, which exempts re-captured neutrals from its payment. But let a nation change its laws and its practice on this ſubject; let its legiſlation be ſuch as to ſubject to condemnation all neutrals captured by its cruizers, and who will ſay that no benefit is conferred by a re-capture? In ſuch a courſe of things the ſtate of the neutral is completely changed. So far from being ſafe, he is in as much danger of condemnation as if captured by his own declared enemy. A ſeries of deciſions then, and of rules founded on his ſuppoſed ſafety, no longer apply. Only thoſe rules are applicable, which regulate a ſituation of actual danger. This is not, as it has been termed, a change of principle, but a preſervation of principle by a practical application of it according to the original ſubſtantial good ſenſe of the rule.

It becomes then neceſſary to enquire whether the laws of France were ſuch as to have rendered the condemnation of the Amelia ſo extremely probable, as to create a caſe of ſuch real danger, that her re-capture by captain Talbot muſt be conſidered as a meritorious ſervice entitling him to ſalvage.

To prove this the counſel for the plaintiff in error has offered ſeveral decrees of the French government, and eſpecially one of the 18th of January, 1798.

Objections have been made to the reading of theſe decrees as being the laws of a foreign nation, and therefore facts, which like other facts, ought to have been

TALBOT v. SEEMAN.

proved, and to have formed a part of the case stated for the consideration of the court.

That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted, (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law without being proved as facts. It has been said that this is done by consent: that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts.

It is therefore the opinion of the court that the decree should be read as an authenticated copy of a public law of France interesting to all nations.

The decree ordains that "the character of vessels, re-
"lative to their quality of neuter or enemy, shall be de-
"termined by their cargo; in consequence, every vessel
"found at sea, loaded in whole or in part with merchan-
"dize the production of England or her possessions, shall
"be declared good prize, whoever the owner of these
"goods or merchandize may be."

This decree ſubjects to condemnation in the courts of France a neutral veſſel laden, in whole or in part, with articles the growth of England or any of its poſſeſſions. A neutral thus circumſtanced cannot be conſidered as in a ſtate of ſafety. His re-captor cannot be ſaid to have rendered him no ſervice. It cannot reaſonably be contended that he would have been diſcharged in the ports of the belligerent, with coſts and damages.

Let us then enquire whether this was the ſituation of the Amelia. The firſt fact ſtates her to have ſailed from Calcutta in Bengal, in April, 1799, laden with a cargo of the product and manufactory of that country. Here it is contended that the whole of Bengal may poſſibly not be in poſſeſſion of the Engliſh, and therefore it does not appear that the cargo was within the deſcription of the decree. But to this it has been anſwered, that in enquiring whether the Amelia was in danger or not this court muſt put itſelf in the place of a French court of admiralty, and determine as ſuch court would have determined. Doing this, there ſeems to be no reaſon to doubt that the cargo, without enquiring into the preciſe ſituation of the Britiſh power in every part of Bengal, being prima facie of the product and manufacture of a poſſeſſion of England, would have been ſo conſidered, unleſs the contrary could have been plainly ſhewn.

The next fact relied on by the defendant in error is, that the Amelia was ſent to be adjudged according to the laws of war, and from thence it is inferred that ſhe could not have been judged according to the decree of the 18th of January.

It is to be remembered that theſe are the orders of the captor, and without a queſtion, in the language of a French cruizer, a law of his own country furniſhing a rule of conduct in time of war, will be ſpoken of as one of the laws of war.

But the third and fourth facts in the ſtatement admit the Amelia, with her cargo, to have belonged to a citizen of Hamburgh, which city was not in a ſtate of hoſtility with the republic of France, but was to be conſidered as neutral between the then belligerent powers.

TALBOT v. SEEMAN.

It has been contended that these facts not only do not show the re-captured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her.

The whole statement taken together amounts to nothing more than that Hamburgh was a neutral city; and it is precisely against neutrals that the decree is in terms directed. To prove, therefore, that the Amelia was a neutral vessel, is to prove her within the very words of the decree, and consequently to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice.

It has been contended that this decree might have been merely in terrorem; that it might never have been executed; and that being in opposition to the law of nations, the court ought to presume it never would have been executed.

But the court cannot presume the laws of any country to have been enacted in terrorem, nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct.

These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had placed the Amelia; nor

is France in any manner to be affected by the decree this court may pronounce. Her intereſt in the veſſel was terminated by the re-capture, which was authorized by the ſtate of hoſtility then ſubſiſting between the two nations. From that time it has been a queſtion only between the Amelia and the re-captor, with which France has nothing to do.

It is true that a violation of the law of nations by one power does not juſtify its violation by another; but that remonſtrance is the proper courſe to be purſued, and this is the courſe which has been purſued. America did remonſtrate, moſt earneſtly remonſtrate to France againſt the injuries committed on her; but remonſtrance having failed, ſhe appealed to a higher tribunal, and authorized limited hoſtilities. This was not violating the law of nations, but conforming to it. In the courſe of theſe limited hoſtilities the Amelia has been re-captured, and the enquiry now is, not whether the conduct of France would juſtify a departure from the law of nations, but what is the real law in the caſe. This depends on the danger from which ſhe has been ſaved.

Much has been ſaid about the general conduct of France and England on the ſeas, and it has been urged that the courſe of the latter has been ſtill more injurious than that of the former. That is a conſideration not to be taken up in this cauſe. Animadverſions on either, in the preſent caſe, would be conſidered as extremely unbecoming the judges of this court, who have only to enquire what was the real danger in which the laws of one of the countries placed the Amelia, and from which ſhe has been freed by her re-capture.

It has been contended that an illegal commiſſion to take, given by France, cannot authorize our veſſels to re-take; that we have no right by legiſlation to grant ſalvage out of the property of a citizen of Hamburgh, who might have objected to the condition of the ſervice.

But it is not the authority given by the French government to capture neutrals, which is legalizing the re-capture made by capt. Talbot, it is the ſtate of hoſtility between the two nations which is conſidered as having authorized that act. The re-capture having been made lawfully, then the right to ſalvage, on general principles, de-

TALBOT v. SEEMAN.

pends on the ſervice rendered. We cannot preſume this ſervice to have been unacceptable to the Hamburgher, becauſe it has bettered his condition; but a re-capture muſt always be made without conſulting the re-captured. The act is one of the incidents of war, and is in itſelf only offenſive as againſt the enemy. The ſubſequent fate of the re-captured depends on the ſervice he has received, and on other circumſtances.

To give a right to ſalvage, it is ſaid there muſt be a contract either expreſs or implied.

Had Hamburgh been in a ſtate of declared war with France, the re-captured veſſels of that city would be admitted to be liable to pay ſalvage. If a contract be neceſſary, from what circumſtances would the law, in that ſtate of things imply it? Clearly from the benefit received, and the riſk incurred. If in the actual ſtate of things there was alſo benefit and riſk, then the ſame circumſtances concur, and they warrant the ſame reſult.

It is alſo urged that to maintain this right, the danger ought not to be merely ſpeculative, but muſt be imminent and the loſs certain.

That a mere ſpeculative danger will not be ſufficient to entitle a perſon to ſalvage is unqueſtionably true. But that the danger muſt be ſuch, that eſcape from it by other means was inevitable, can not be admitted.

In all the caſes ſtated by the counſel for the defendant in error, ſafety by other means was poſſible, though not probable. The flames of a ſhip on fire might be extinguiſhed by the crew, or by a ſudden tempeſt. A ſhip on the rocks might poſſibly be got off by the aid of wind and tides without aſſiſtance from others. A veſſel captured by an enemy might be ſeparated from her captor, and if ſailors had been placed on board the prize, a thouſand accidents might poſſibly deſtroy them; or they might even be blown by a ſtorm into a port of the country to which the prize veſſel originally belonged.

It cannot therefore be neceſſary that the loſs ſhould be inevitably certain, but it is neceſſary that the danger ſhould

be real and imminent. It is believed to have been ſo in this caſe. The captured veſſel was of ſuch deſcription that the law by which ſhe was to be tried, condemned her as good prize to the captor. Her danger then was real and imminent. The ſervice rendered her was an eſſential ſervice, and the court is therefore of opinion that the re-captor is entitled to ſalvage.

The next object of enquiry, is, what ſalvage ought to be allowed? The captors claim one half the groſs value of the ſhip and cargo. To ſupport this claim they rely on the act "for the government of the navy of the United States," paſſed the 2d of March, 1799. This act regulates the ſalvage payable on the ſhips and goods belonging to the citizens of the United States, or to the citizens or ſubjects of any nation in amity with the United States, re-taken from the enemy.

It has been contended that the caſe before the court is in the very words of the act. That the owner of the Amelia is a citizen of a ſtate in amity with the United States, re-taken from the enemy. That the deſcription would have been more limited, had the intention of the act been to reſtrain its application to a re-captured veſſel belonging to a nation engaged with the United States againſt the ſame enemy.

The words of the act would certainly admit of this conſtruction.

Againſt it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, ſo to be conſtrued as to infract the common principles and uſages of nations, or the general doctrines of national law. If the conſtruction contended for be given to the act, it ſubjects to the ſame rate of ſalvage a re-captured neutral, and a re-captured belligerent veſſel. Yet, according to the law of nations, a neutral is generally to be reſtored without ſalvage.

This argument in the opinion of the court, derives great additional weight from the conſideration that the act in queſtion is not temporary, but permanent. It is not merely fitted to the then exiſting ſtate of things, and

TALBOT v. SEEMAN.

calculated to expire with them, but is a regulation applying to preſent and future times.

Whenever the danger reſulting to captured neutrals from the laws of France ſhould ceaſe, then, according to the principles laid down in this decree, the liability of re-captured neutrals to the payment of ſalvage, would, in conformity with the general law and uſage of nations, ceaſe alſo. This event might have happened, and probably did happen, before hoſtilities between the United States and France were terminated by treaty. Yet, if this law applies to the caſe, ſalvage from a re-captured neutral would ſtill be demandable.

This act then, if the words admit it, ſince it provides a permanent rule for the payment of ſalvage, ought to be conſtrued to apply only to caſes in which ſalvage is permanently payable.

On inſpecting the clauſe in queſtion, the court is ſtruck with the deſcription of thoſe from whom the veſſel is to be re-taken in order to come within the proviſions of the act. The expreſſion uſed is *the enemy*. A veſſel re-taken from the enemy. The enemy of whom? The court thinks it not unreaſonable to anſwer, of both parties. By this conſtruction the act of congreſs will never violate thoſe principles which we believe, and which it is our duty to believe, the legiſlature of the United States will always hold ſacred.

If this act does not comprehend the caſe, then the court is to decide, on a juſt eſtimate of the danger from which the re-captured was ſaved, and of the riſk attending the re-taking of the veſſel, what is a reaſonable ſalvage. Conſidering the circumſtances, and conſidering alſo what rule has been adopted in other courts of admiralty, one-ſixth appears to be a reaſonable allowance.

It is therefore the opinion of the court, that the decree of the circuit court, held for the diſtrict of New-York, was correct in reverſing the decree of the diſtrict court, but not correct in decreeing the reſtoration of the Amelia without paying ſalvage. This court, therefore, is of opinion, that the decree ſo far as the reſtoration of the

Amelia without ſalvage is ordered, ought to be reverſed, and that the Amelia and her cargo ought to be reſtored to the claimant, on paying for ſalvage one-ſixth part of the nett value, after deducting therefrom the charges which have been incurred.

TALBOT v. SEEMAN.

GEORGE WILSON *v.* RICHARD MASON,

DEVISEE OF GEORGE MASON,

AND

RICHARD MASON, DEVISEE OF GEORGE MASON,

v.

GEORGE WILSON,

WILSON v. MASON.

THESE were writs of error to the diſtrict court of the United States, for the diſtrict of Kentucky, upon croſs caveats for the ſame tract of land.

Waſte and unappropriated lands in Kentucky, in the year 1780, could not be lawfully appropriated by ſurvey alone, without a previous legal entry in the book of entries.

The caveat of Wilſon *v.* Maſon originated in the ſupreme court for the diſtrict of Kentucky in 1785, while Kentucky was a part of the commonwealth of Virginia, and the record ſtates, "that heretofore, viz. at a ſupreme "court for the diſtrict of Kentucky, held at Danville in the "ſaid diſtrict, in the month of March, 1785, came George "Wilſon and cauſed a certain caveat to be entered againſt "George Maſon, which is in the following words, viz. "Let no grant iſſue to George Maſon, of Fairfax coun-"ty, for 8,300 acres of land, in Jefferſon county, ſur-"veyed on the ſouth ſide of Panther creek, adjoining "another ſurvey of the ſaid Maſon's, of 8,400 acres, "on the upper ſide; becauſe the ſaid George Maſon has "ſurveyed the ſame contrary to his *location*, for which "cauſe, and alſo on account of the vagueneſs of the "entry, George Wilſon claims the ſame, or ſo much "thereof, as interferes with his entry, made on treaſury "warrants for 40,926 acres, ſpecially made on the 9th "day of April, 1784. Entered 25th March, 1785."

A writ of error upon a caveat, lies from the diſtrict court of Kentucky diſtrict, to the ſupreme court of the United States.

Notice of an illegal act, will not make it valid.

A ſurvey in Kentucky not founded on an entry, is a void act and conſtitutes no title whatever; and land ſo ſurveyed remains vacant, and liable to be appropriated by any perſon holding a land-warrant.

"Whereupon, at October term, 1785, a ſummons "iſſued, commanding the ſheriff of Fairfax county to "ſummon George Maſon to appear at the next March "term, to ſhew cauſe why the 8,300 acres ſhould not be

WILSON v. MASON.

"granted to George Wilſon, or ſo much as interferes "with his entry for 40,926 acres, made on the 9th of "April, 1784."

Afterwards, and after Kentucky became a ſeparate ſtate, at a court held for the diſtrict of Bairdſtown, in September, 1797, "to which court this ſuit had been "removed, and the ſaid George Maſon having departed "this life, the ſaid ſuit was orded to be revived in the "name of Richard Maſon, the deviſee of George Maſon "deceaſed, who was deviſee of George Maſon deceaſed." Richard Maſon then removed the cauſe from the ſtate court to the diſtrict court of the United States, for the diſtrict of Kentucky, and it was agreed by the parties, "that the judgment in this caveat (Wilſon *v.* Maſon) if "for the plaintiff, ſhould be entered up as a judgment "for the defendant in the caveat Maſon *v.* Wilſon: and "if for the defendant, as a judgment for the plaintiff "in the ſaid caveat Maſon *v.* Wilſon, which ſuits are "croſs caveats between the parties for the ſame land." "And thereupon came a jury, &c. who, being elected, "tried and ſworn *well and truly to enquire into ſuch facts as "may be material in this cauſe, and not agreed to by the par-"ties*," found the ſpecial verdict herein after ſtated.

The croſs caveat of Richard Maſon *v.* Wilſon was filed on the 13th of March, 1799, and ſeems to be in the nature of a plea or anſwer to the claim of Wilſon. It is in the following form, viz. "Let no grant iſſue to "George Wilſon, or his aſſignees, on the ſaid Wilſon's "ſurvey of 30,000 acres of land lying in Jefferſon coun-"ty (now Nelſon county) on the ſouth ſide of Panther "creek, a branch of Green river, made by virtue of an "entry dated April the 9th, 1784, for 40,926 acres, "upon the five following land-office treaſury warrants, "No. 17,639, 19,143, 19,614, 19,616, and 12,795. "Richard Maſon, infant heir and deviſee of George "Maſon, junior, who was heir and deviſee of George "Maſon, eſquire, late of Fairfax county, Virgina, a ci-"tizen of the commonwealth of Virginia, by Cuthbert "Banks, his next friend, enters a caveat againſt the ſame "for the following cauſes:

"Becauſe the ſaid ſurvey includes a tract of 8,300 "acres which had been before located and entered by the

" ſaid George Maſon in the year 1780, and which tract " had been actually ſurveyed for him, the ſaid George " Maſon, and the certificate of ſurvey thereof, dated " October 2d, 1783, returned to the county ſurveyor's " office long before the ſaid George Wilſon made his ſaid " entry; and becauſe the ſaid entry, made by the ſaid " George Wilſon, on which his ſaid ſurvey is founded, " was illegal and fraudulent, the ſaid George Wilſon " having knowingly and wilfully located his ſaid entry " upon lands which had been actually before appropriated " and ſurveyed for others, as appears by the words of the " ſaid Wilſon's own entry, which begins at the upper " and north-eaſt corner of the ſaid George Maſon's " 8,400 acre ſurvey, on the bank of Panther creek, up- " on which ſurvey of 8,400 acres, the adjacent ſurvey " made for George Maſon of 8,300 acres, made about the " ſame time, binds, and runs thence ſouth 10° eaſt (be- " ing the courſe to a ſingle degree of the dividing line " between the ſaid Maſon's two tracts of 8,400 and " 8,300 acres) paſſing the ſaid Maſon's ſouth-eaſt corner " 2,600 poles north, 80° eaſt (which is the courſe to a " ſingle degree of the back line of George Maſon's ſaid " ſurvey of his tract of 8,300 acres) 3,200 poles, and off " at right angles, northwardly to the bank of Panther " creek; and down the ſame, according to the meanders " thereof, to the beginning; whereby it includes the " whole of Richard Maſon's ſaid tract of 8,300 acres, as " deviſee as aforeſaid of George Maſon, as well as ſome " other lands which have been previouſly located and ſur- " veyed for other people; which above mentioned courſes " could not have been inſerted in Wilſon's entry, in the " manner they are, without his having been acquainted " with the ſaid ſurveys made by George Maſon before " mentioned; the plats and certificates of which, were, " at the time of Wilſon's ſaid entry, in the county ſur- " veyor's office; and from which it is evident Wilſon " gained the information by which he made his ſpecial " entry." The original caveat of George Maſon *v.* Wilſon was entered May 6th, 1785.

Maſon's entries, in the book of entries, were as follow, viz.

" 1780, April 29th, George Maſon enters 8,400 acres " of land, to begin on Panther creek, on the *eaſt* ſide

WILSON v. MASON.

"thereof, oppoſite to a beech on the weſt ſide, about "four miles *above* the mouth of the *weſt fork*, and to "run up and down the ſaid creek, and eaſtwardly for "quantity."

"1780, April 29th, George Maſon enters 8,300 acres, "to begin at the upper corner of his 8,400 acre entry, "and to run up the creek, on the eaſt ſide, and back for "quantity."

"1780, October 27th, George Maſon deſires to make "his entry of 8,400 acres more ſpecial on Panther creek, "viz. to begin four miles above the forks of Panther "creek, where it mouths into Green river, on the eaſt "ſide, running up and back for quantity."

The tract of 8,400 acres was ſurveyed on 27th September, 1783, beginning four miles above the mouth of Panther creek, where it empties into Green river, and not four miles above the mouth of the weſt fork of Panther creek, as mentioned in his firſt entry. The mouth of Panther creek being more than twelve miles below the mouth of the weſt fork.

The tract of 8,300 acres was ſurveyed on the 2d of October, 1783, adjoining to the ſurvey of 8,400 acres, *below* the mouth of the weſt fork, and not above, as it would have been if ſurveyed according to the entry of the 29th April, 1780.

George Wilſon's entry is as follows, viz.

"1784, April 9th, George Wilſon enters 40,926 "acres upon five treaſury warrants, No. 17,639, 19,143, "19,614, 19,616, 12,795, on the ſouth ſide of Panther "creek, a branch of Green river, beginning at the upper "and north-eaſt corner of George Maſon's 8,400 acre "ſurvey on the bank of Panther creek, which ſurvey be-"gins, perhaps, about three miles from the mouth of "the ſaid creek and 320 poles upon a direct line above "the mouth of the firſt fork of the ſaid creek from the "mouth, thence running ſouth 10° eaſt, paſſing the ſaid "Maſon's ſouth-eaſt corner 2,600 poles; thence north "80° eaſt 3,200 poles; thence off at right angles, north-

"wardly, to the bank of Panther creek, and down the "ſame, with the ſeveral meanders thereof, to the place "of beginning."

Upon four of thoſe warrants, 30,000 acres were ſurveyed for Wilſon on the 2d June, 1784, and located ſo as to comprehend the whole of Maſon's ſurvey of 8,300 acres.

The following facts were agreed to by the counſel for both parties, viz.

"1. We admit that Panther creek has been known "and called by that name, Panther creek, generally, "ſince the beginning of the year 1780, and is truly re-"preſented on the plat returned in this cauſe, and alſo "the forks thereof.

"2. That at the diſtance of twelve and one quarter "miles and thirty-ſix poles, on a direct line from its "mouth, the ſaid creek divides itſelf into two forks, viz. "the fork marked, on the plat returned in this cauſe, as the "weſt fork of ſaid creek; and the other, the fork marked "on the plat, Panther creek; and that from the ſize and "natural deſcriptions of theſe forks, they would be re-"marked and called ſuch by ſtrangers who ſhould explore "the waters of that creek.

"3. That the ſaid forks were generally known, and "called the forks of Panther creek, from the beginning "of the year 1780; and that they were notorious as "ſuch, to all who had acquaintance with the waters in "that part of this country.

"4. That in the winter before the ſaid entries were "made for ſaid defendant, the ſaid agent, Hancock Lee, "went down on Panther creek, and explored the country "thereabouts; and encamped thereabouts four or five "weeks for that purpoſe; and there were ſeveral others "in company with him, who all went on the buſineſs of "viewing the land in that quarter.

"5. That James Hord was the ſurveyor who ſurveyed "the ſaid entries in September and October, 1783.

WILSON v. MASON.

"6. That Hubbard Taylor was the special attorney of "the defendant Mason, for the purpose of making his "surveys on Panther creek, among which was the one "now in controversy, and previous to making said surveys, "the said Taylor made out a plat of Panther creek, up to "the forks thereof, by actual survey, for the purpose of "satisfying himself how the survey of the said defendant "ought to be made; which plat he delivered to the said "Hord, when he went to make the surveys of the said "lands, for his instruction; and by the said plat the said "Hord was instructed to make the surveys of the said "defendant as they are now surveyed. The entries, al-"luded to in the 4th fact, are those found by the jury "to have been made for the defendant, by Hancock Lee, "at the same time with that of the land in controversy."

The verdict of the jury was as follows, viz.

"We of the jury do find the facts following for the "plaintiff, excluding those agreed to by the attornies,

"1. That the said Hancock Lee, at the time he made "the said entry for the said Mason, did also make the "several other entries for him.

"2. That the plats and certificates of survey lay three "weeks in the office before they were recorded.

"3. That at the time of making out and recording the "plats of said surveys, William Mason was agent to the "said George Mason, and came to this country for the "express purpose of attending to his land business; and "had power and instructions to re-survey any of the said "Mason's entries, which he should find to have been er-"roneously surveyed, or interfering with better claims.

"4. That it was a general practice in the offices of "surveyors, when a survey was found to have been made "erroneously, to make the same over again at the request "of the parties concerned; and the said practice pre-"vailed also in cases of surveys recorded.

"5. That when William Mason came to the surveyor's "office to take out the plats in this case, and also those in

" the other cafes in which George Mafon was concerned, " the furveyor told him that the entries of the faid George, " the defendant, had been furveyed wrong; and took a " pen and paper and explained to him the calls of the en- " tries, and by comparing them with the furveys, fhewed " him that they were erroneous; and offered to fend a " deputy with him, without further or additional ex- " pence, to make the furveys aright, with which propofal " the faid William feemed pleafed, and proceeded no fur- " ther in the bufinefs at that time; but went away and " after fome days came back to the faid office, and told " the furveyor, that the entries of faid Mafon were fo " made that they would clafh with each other, if furvey- " ed otherwife than they then were; and he did not fee " that the furveys could be amended: whereupon, he " took out the plats and certificates of furvey to return " them to the regifter's office, and actually did fo; which " tranfaction happened at the office of the furveyor, about " the 12th of September, 1784.

" 6. That the lands, generally, over all the ftate of " Kentucky, except the land referved by law for entries, " are involved in difputes, by different entries and fur- " veys having been made for the fame tracts.

" 7. That it was ufual for the furveyors to furvey en- " tries agreeable to the directions of the proprietors or " their agents, when fuch directions were given.

" 8. That a law, paffed by the aflembly of Kentucky " in 1792, prohibited any further entry of land with the " furveyors, and that ever fince that time no land could " be appropriated by virtue of land warrants.

" 9. That the practice of entering for land was a ge- " neral ftrife for the beft legal entry.

" 10. That George Mafon's entry of 8,400 acres, made " the 17th day of October, 1780, is furveyed on Panther " creek, and a large branch thereof; and not on either " of the main forks of faid creek, as appears by the plat; " and that the furvey of 8,300 acres, being the land in " controverfy, adjoining the laft mentioned furvey, above, " on faid creek, and defcribed in the plat in this caufe by

WILSON v. MASON.

" the letters and figures A. E. F. 8, is claimed, by the " defendant Maſon, as a ſurvey made by the ſaid Maſon, " on an entry of his, dated the 29th day of April, 1780, " for 8,300 acres of land; is on ſaid creek and a branch " thereof, and not on either of the main forks, as ap- " pears by the plat.

" 11. That the place deſignated, in the corrected plat, " by the letter A, on the ſouth ſide of Panther creek, is " the place called for, by the plaintiff, as the beginning " corner of his entry of 40,926 acres, and deſcribed " agreeable to the plat.

" 12. That it was a practice, in the office of William " May, ſurveyor of Jefferſon, with whom the defendant " Maſon's entries were made, and by whoſe deputy ſur- " veyor, James Hord, the defendant's ſurveys were made, " to alter ſurveys diſcovered to be erroneous or wrong, " after they were recorded, and ſurvey them aright, with- " out further or additional expence to the owners of ſuch " entries, and to proceed on the plats of the amended " ſurveys, as the proper plats of the legal ſurvey.

" 13. That the ſaid Hord, when on his way to make " ſaid ſurveys, called on ſaid ſurveyor of Jefferſon, for " copies of the defendant's entries, and on ſeeing them " was ſtruck with the variance between the calls of the " entries and his inſtructions, in point of location, and " on that account did not return the plats of the ſaid ſur- " veys, until he had ſeen Hubbard Taylor, and ſhewed " them to him, and repreſented his opinion of ſuch vari- " ance; but on their being ſhewn to the ſaid Taylor, he " directed ſaid ſurveys to be returned as they were then " made.

" 14. That the ſaid Hord was fully informed of the " forks of Panther creek, when he was making ſaid de- " fendant's ſurveys, and ſaw the ſame, and about the " ſame time at which he made the defendant's ſaid ſur- " veys, and before he returned from doing the ſame."

(Signed) " *Daniel Weiſiger, foreman.*"

" We of the jury do find the following facts for the " defendant Maſon.

"1. That the entry made in the name of George Wil-
"son, April 9th, 1784, of 40,926 acres, on the south
"side of Panther creek, claiming under which, the said
"Wilson entered this caveat, although made in his name,
"was made for the benefit of Christopher Greenup, and
"John Handley, as well as for his benefit, and that the said
"Greenup and Handley were, at the time of making the
"entry, and long since, partners with him in the same.

"2. That John Handley, then a deputy surveyor of
"the county, made the said entry of 40,926 acres, for
"himself and the other partners; and before he made
"the same, had obtained information of the surveys
"made for George Mason, on his entries of 8,300, and
"8,400 acres, on the south side of Panther creek, from
"the surveys then in the office of the surveyor.

"3. That the said George Wilson, Christopher Green-
"up, and John Handley, had before, and at the time the
"said entry of 40,926 acres, was made, notice of the
"place where, and the manner in which, the surveys
"had been made for George Mason, on his entries of
"8,300 acres, and 8,400 acres, on the south side of Pan-
"ther creek.

"4. That John Handley, before the said entry of 40,
"926 acres was made, had notice that the land, now in
"dispute in this caveat, had been included in Mason's
"survey, on his entry of 8,300 acres.

"5. That the surveys, made for the said Mason, on
"his entries of 8,400, and 8,300 acres, on the south side
"of Panther creek, were returned to the office of the
"surveyor of the county, in the course of the fall, 1783.
(Signed) "*Daniel Weisiger, foreman.*"

The judgment of the district court of the United States, for the district of Kentucky, at June term 1800, in the caveat of *Wilson v. Mason*, was, "That the defendant
"hath the better right to the land in controversy; It is
"therefore ordered that the caveat be dismissed, and that
"the defendant recover against the plaintiff his costs in
"this behalf expended."

WILSON v. MASON.

In the caveat of *Maſon v. Wilſon*, the judgment was, "That the plaintiff recover againſt the defendant ſo much "of the land in controverſy as is included within the ſur- "vey of 8,300 acres, made by George Maſon, on his en- "try of 8,300 acres, entered *March* (Qu. April) the 29th "1780, and deſignated in the corrected plat returned in "the ſaid other caveat, by the letters D. E. F. 8, and "alſo his coſts by him about his ſuit in this behalf ex- "pended."

After theſe judgments were entered, Wilſon, by his counſel, moved the court for a citation on a writ of error to the ſupreme court of the United States, to which Maſon, by his counſel, objected, alledging that by the acts of aſſembly of Virginia, under which the plaintiff Wilſon claims, it is provided that no appeal or writ of error ſhall be allowed on a judgment entered on a caveat, and that, therefore, in this caſe the plaintiff was precluded from claiming the benefit of a writ of error. But the court over-ruled this objection and granted the citation, to which opinion the defendant excepted.*

* The following is the opinion of judge Innes, who tried the cauſe in the diſtrict court; and which is alluded to in the ſubſequent arguments of counſel. After ſtating the facts of the caſe he proceeds. "The novelty "of this caſe, the number of facts ſubmitted and found by the jury, as "well as the ingenious manner in which it was argued by the counſel "of both plaintiff and defendant, have attracted my particular attention, "and induced me to weigh the ſubject deliberately; the reſult of my de- "liberations will appear from the following opinion:

"The firſt queſtion which preſents itſelf in this cauſe is, whether Ma- "ſon has ſurveyed 8,300 acres of land contrary to his entry made the "29th of April, 1780.

"The alteration of Maſon on the 27th day of October, 1780, to the "entry of 8,400 acres, dated the 29th day of April preceding, is conſi- "dered as a withdrawing of, and a total abandonment of the firſt entry. "The *firſt* entry calling to lie about four miles above the mouth of the "weſt fork, the *ſecond* four miles from the mouth of the main creek.

"The ſurvey, therefore, of the 8,300 acres is made contrary to the "entry, as it adjoins the tract of 8,400, which is made in conformity to "the new entry.

"This deciſion, that the land in queſtion is ſurveyed contrary to en- "try, brings me to the principal queſtion in this cauſe; will Maſon's "ſurvey for 8,300 acres of land, made contrary to his entry, ſecure the "land to him againſt the claim of Wilſon, founded on a ſpecial entry, "ſubſequent to the recording of Maſon's ſurvey, Wilſon having, before "he made his entry, *notice* of the place where, and manner in which, "Maſon had ſurveyed, and of the ſurvey being recorded?

"The parties to this ſuit are both conſidered as purchaſers of the "commonwealth; *Chancery reviſion of the laws, p.* 95, 96, §. 3. the ſur- "veyor

This cauſe was argued at laſt term by Daveiſs and C. Lee for the plaintiff in error, and Jones and Maſon for for defendant.

" veyor of the county, as her miniſterial agent; who is authorized to " receive warrants for land, make entries, ſurvey the ſame, receive the " ſurveys when made, record the plat and certficate within three months " after it is returned to his office, provided, upon examination, he finds " it *truly* made and legally proportioned as to length and breadth.

" I will here take notice of two arguments, urged by the plaintiff's " counſel, viz. that the word "*truly*," uſed in the law, when ſpeaking " of the duties of the ſurveyor, referred to a power over the entry; that " it was his duty to ſee that the entry and ſurvey agreed.

" This would be a dangerous conſtruction of the law, as it would au- " thorize the ſurveyor to determine the rights of claimants, and to judge " in his own cauſe where a ſurvey ſhould be made that interfered with a " claim of his. I conceive him miniſterial, except in two caſes; he is to " examine the plat that it is *truly* made; i. e. to ſee that the courſes of the " ſurvey are truly laid down, and that it contains its complement of acres. " It is to this part of his duty that the word *truly* refers. Again, he is " to examine the legal proportion of the plat. In theſe two caſes he acts " judiciouſly; and it is right he ſhould be veſted with ſuch a power; be- " cauſe, as he acts generally by deputy, it enables him to correct the work " of his deputy, and alſo to prevent improper combinations between the " employer and deputy.

" The ſecond argument alluded to is this; that neither the entry-book, " or book for entering ſurveys, are record-books; and that legiſlative in- " terference was neceſſary to conſtitue them ſuch, *ch. rev.* 96, 220. They " are books directed to be procured by law. The ſurveyor is a ſworn " officer, commiſſioned agreeably to law. Copies of entries and copies " of ſurveys, atteſted by him, are good evidence in a court of juſtice. I " therefore conſider every entry, and every ſurvey, entered in theſe books " as being of record, and equally valid with thoſe which are uſually ſtiled " records.

" Maſon, a purchaſer of the commonwealth, having ſurveyed contrary " to his entry, returns the ſurvey to the ſurveyor's office, where it is ex- " amined and recorded before the claim of any other perſon appears to " the land. Can the commonwealth deſtroy Maſon's ſurvey and refuſe " her grant to the land?

" The law has pointed out no mode by which the commonwealth can " ſet aſide Maſon's ſurvey for her own benefit; neither was ſuch a provi- " ſion neceſſary; becauſe he had paid the purchaſe-money, for ſo many " acres of unappropriated land. It was vacant; and ſo ſoon as his ſur- " vey was recorded, his *warrant* was carried into *full execution*, and the " entry of 8,300 acres became vacant, and reverted to the commonwealth, " there being no warrant in the ſurveyor's office to cover it, the warrant " being returned to the owner with the plat and certificate of ſurvey. Or, " being recorded is the ſame thing in effect, as it can never be again acted " upon, *being executed by actual ſurvey*. *Ch. rev.* §. 3. *p.* 95, 96. Any " practice to the contrary I deem illegal and contrary to law.

" From this ſtatement of facts I determine Maſon's right to be good " againſt the commonwealth.

" As the commonwealth can take no advantage of Maſon's ſurveying " contrary to entry, ſhall Wilſon, by his ſubſequent ſpecial entry, when " he had full and perfect knowledge of the place where Maſon's ſurvey " was made, and of its being recorded.

" There

WILSON v. MASON.

Daveiſs for plaintiff in error.

As the counſel for the defendant in error have objected to our right of appeal in this cauſe, I ſhall at firſt confine myſelf to that point; becauſe, if the court ſhould agree

"There are only two ways of deſtroying a man's right to a tract of "land. By caveat after ſurvey and before the title is complete; or, by a "ſuit in chancery after the grant has iſſued.

"In the preſent caſe Wilſon has choſen to enter a caveat to prevent the "emanation of a grant to Maſon; alledging that Maſon has ſurveyed "contrary to entry, and that it is vague, for which reaſons he claims the "land by virtue of a ſpecial entry

"There are four cauſes ſtated in the land-law which authorize the en- "tering of a caveat. 1. Failing to regiſter the plat and certificate of "ſurvey within twelve months after making the ſurvey: 2. If the "breadth of the plat be not one-third of its length: 3. If any perſon "ſhall obtain a ſurvey of land to which another *hath* by law a *better* right, "the perſon having ſuch *better* right may in like manner enter a caveat, "&c. 4. If the plaintiff in a caveat recover judgment and fails to deliver "the ſame, &c. into the land-office within ſix months after judgment, it "ſhall be lawful for any perſon to enter a caveat, &c. The two firſt "and fourth cauſes are penalties which any perſon may take advantage of, "and do not apply to the preſent caſe. The third requires an exiſting right "in the caveator at or before the time the ſurvey caveated is recorded

"From an attentive conſideration of this paſſage in the law, it conveys to "me this idea: "*Shall obtain a ſurvey of lands*," means ſubſequent to the "paſſing of the law, and after the ſurvey is recorded; and not from the "making, becauſe the ſurvey is not *complete* until it is recorded; neither "could he "*obtain*" it till the ſurveyor has performed that part of his "duty, after which it is to be delivered to the proprietor with the warrant. "Previous to the recording I conſider the ſurvey to be under the direction "of the owner, and that he may make any alteration he pleaſes in it, but "not after; although a different practice has prevailed, and which upon "enquiry will be found to be contrary to law.

"It is important to this cauſe to conſider another paſſage in the ſame "ſentence of the law; "to which another *hath* by law a better right." "The word *hath* is in the preſent tenſe, and refers to the time of obtain- "ing the ſurvey. If any conſtruction relative to the word *obtain*, be "right, the claim of the caveator muſt exiſt before or at the time of re- "cording the ſurvey. I am confirmed in the propriety of this interpreta- "tion of the law, for the following reaſons: If a deputy ſurveyor makes "a ſurvey, the principal ought not to ſign it till it is recorded; then the "ſignature makes it ready to be delivered. If made by the principal, he "will not deliver it before it is recorded. The ſurvey cannot be conſi- "dered as complete till all the requiſites of the law be performed; the "party is then entitled to it. Neither will the regiſter of the land-office "receive it without that formality. Without theſe requiſites it is of no "more value than waſte paper; it cannot therefore be ſaid to be "*obtain- "ed*," without their being performed.

"The two firſt and fourth cauſes which *juſtify* the entering a caveat, "I have already ſaid, do not apply to the preſent caſe.

"It remains to be conſidered whether Wilſon has purſued the ſtatute ſo "as to bring his caſe within the third cauſe: Had he "*a better right*" to

"the

with them in opinion on that queſtion, much time will be ſaved and much uſeleſs diſcuſſion prevented. It is contended that by the laws of Virginia, upon which the title to the land in diſpute depends, and which give the re-

" the land ſurveyed for Maſon, and for which he has inſtituted this ſuit, " than Maſon had, at the time the ſurvey was recorded?

" A caveat is a new and ſummary mode of proceeding, in derogation " of the proceedings at common law, inſtituted by ſtatute; it is neceſ- " ſary, therefore, to purſue the ſtatute ſtrictly, and ſhew to the court " that the caveator has a clear right to purſue that mode of proceeding. " 1 *D. and E.* 141."

" Wilſon's entry was made on the 9th day of April, 1784. To the " date of his entry I fix the commencement of his claim to the land in con- " troverſy, it being the firſt certain and evident act of ownerſhip manifeſt- " ed by him; which is upwards of four months after Maſon's ſurvey " had been *recorded*."

" As Wilſon's right did not exiſt at the time Maſon's ſurvey was *re-* " *corded*, he has failed to prove the *better right* required by law; neither " has he purſued the ſtatute by aſſigning proper cauſes for caveating. Sur- " veying contrary to entry, or making a vague entry, are not ſtated in " the law as exceptions to a ſurvey, or cauſes for entering a caveat.

" True it is, that there are inſtances in which ſurveying contrary to " entry would be a good cauſe of caveating. But this is where there " is an exiſting right before the ſurvey is made or obtained; and the " queſtion would then reſt on having the *better* right to the land.

" The favourable light in which ſurveys have been viewed by the legiſ- " lature is apparent in all the laws which have been enacted reſpecting " the titles to land They are all to be conſidered as one law, forming " one general ſyſtem on the ſame ſubject.*

" The ſurveys here alluded to were injurious to the intereſt of the " commonwealth, but being made by the proper officer, were confirmed.

" In this caſe the commonwealth is not injured, and Wilſon, through " his partner Handly, had every information neceſſary to guard him " againſt an interference with Maſon's ſurvey.

" Conſidering the parties both as purchaſers of the commonwealth, de- " riving their claims from the ſame ſource; Maſon as the firſt, and Wil- " ſon as the ſecond, the following principles will apply in this caſe re- " ſpecting notice. Lord Hardwicke ſaid, in the caſe of *Le Neve v. Le* " *Neve*, *Amb.* 446 3 *Atk.* 654 " that the taking of a legal eſtate after " notice of a *prior right*, makes a perſon mala fide purchaſer, and is a " ſpecies of fraud." If a perſon does not ſtop his hand, but gets the legal " eſtate when he knew the right in equity was in another, he will be " rebutted by this maxim " fraus et dolus nemini patrocinari debent."

" In the caſe of *Abney v Kendall*, 1 *eq. ca. ab.* 330. *pl.* 1. 1 *chan. ca.* " 38.† it was determined that if A having *notice* that lands were con- " tracted to be ſold to B purchaſes thoſe lands, and takes a conveyance " it ſhall deſtroy the purchaſe and the land ſhall be reconveyed to B.

" Maſon being conſidered the firſt purchaſer of the commonwealth " having obtained his ſurvey, through the means of her agent, (though " contrary to entry, yet of which ſhe can take no advantage, and which " worked

* " *Many acts paſſed the Virginia legiſlature giving further time to return* " *plats, &c.*"

† 1 *Chan. ca.* 38. *Merry v. Abney the father, Abney the ſon, and Kendall.*

WILSON v. MASON.

medy by caveat, no appeal or writ of error will lie. The land law of Virginia, as it is called, viz. the act of May 1779, *(Chancery reviſion of the laws of Virginia, p. 94.)* entitled "An act for eſtabliſhing a land office, and aſcertaining the terms and manner of granting waſte and unappropriated lands," which directs the manner of proceeding upon caveats, enacts that "the court" (that is the general court) "ſhall proceed to determine the right of the cauſe in a ſummary way, without pleadings in writing; empannelling and ſwearing a jury for the finding of ſuch facts as are material to the cauſe, and are not agreed by the parties; and ſhall thereupon give judgment, *on which no appeal or writ of error ſhall be allowed.*"

This law, it is ſaid, was in force at the time of the ſeparation of Kentucky from Virginia; and that by the act of aſſembly of Virginia of December 1789, *rev. code* p. 56. ſect. 7. which preſcribes the terms upon which Kentucky might become an independent ſtate after the 1ſt. of November 1791, it is provided that all private rights and intereſts of lands within the ſaid diſtrict, derived from the laws of Virginia prior to ſuch ſeparation, ſhall remain valid and ſecure, under the laws of the propoſed ſtate, "*and ſhall be determined by the laws* NOW *exiſting in this* STATE."

"worked no iniquity to any perſon, the land being vacant) by recording "the ſurvey, the entry *above* the forks of the creek was abandoned. "Wilſon having *notice*, before he made his entry, that Maſon had appro- "priated the land by the recording of the ſurvey, cannot ſupport his "claim under the ſtatute; judgment, therefore, muſt be entered for the "defendant.

"The preceding pages contain my opinion delivered in the caveat, "George Wilſon againſt Richard Maſon, deviſee, &c at the June term, "1800, of the diſtrict court of the United States for the Kentucky "diſtrict.

"As the principles on which the deciſion was founded will be brought "before the ſupreme court of the United States, where I can have no "opportunity of aſſigning my reaſons in ſupport of the judgment, with "due deference I ſolicit the court to permit the opinion to be read; by "which the principles which governed me in the deciſion will appear "fully before that court which is to reverſe or affirm the judgment I have "given between the parties.

"This requeſt is grounded upon this ſingle conſideration, that what I "have been *officially* obliged to do, may be examined before a final en- "quiry is had reſpecting my judicial acts."

(Signed) "HARRY INNES."

"*May* 18*th*, 1801."

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But we ſhall contend,

1ſt. That the juriſdiction and powers of this court do not depend upon the laws of Virginia, but upon the conſtitution of the United States, and the acts of congreſs.

2dly. That the laws of particular ſtates loſe their force when they contravene the acts of congreſs.

3dly. That by the law of Virginia a right of appeal is allowed upon a caveat.

1ſt. By the conſtitution of the United States, art. 3. ſect. 2. "the judicial power ſhall extend" "to controver-"ſies between citizens of different ſtates," and in all caſes, except where a public miniſter, or a ſtate, ſhall be a party, "the ſupreme court *ſhall* have *appellate* juriſdiction, both "as to law and fact, with ſuch exceptions, and under ſuch "regulations as the congreſs ſhall make." Congreſs have not excepted the preſent caſe; it therefore follows, that by the conſtitution of the United States, this court has appellate juriſdiction of the cauſe.

2dly. By the conſtitution of the United States, art. 6. "This conſtitution, and the laws of the United "States, which ſhall be made in purſuance thereof, ſhall "be the ſupreme law of the land; and the judges, in "every ſtate, ſhall be bound thereby, '*any thing in the con-*"*ſtitution or laws of any ſtate to the contrary notwithſtanding.*" By the 10th ſection of the judiciary act of 1789, the diſtrict court of Kentucky has juriſdiction of all caſes by that act made originally cognizable by the circuit courts, and it is enacted that "writs of error and appeals, *ſhall* lie, from deciſions therein, to the ſupreme court in the ſame "cauſes, as from a circuit court to the ſupreme court and "under the ſame regulations." This cauſe having been removed, by the defendant Maſon, from the ſtate court, into the diſtrict court of the United States for the diſtrict of Kentucky, under the 12th ſection of the judiciary act of 1789, is to "proceed in the ſame manner as if it had "been brought there by original proceſs." And by the 22d ſection, "final judgments and decrees in civil ac-"tions in a circuit court, brought there by original pro-"ceſs, *or removed there from courts of the ſeveral ſtates,*"

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WILSON v. MASON.

where the matter in diſpute exceeds 2000 dollars, may be re-examined and reverſed or affirmed in the ſupreme court.

A cauſe may be removed into a circuit court from a ſupreme court of a ſtate, from which, by the laws of the ſtate, no appeal or writ of error would lie; and if the principle contended for by the oppoſite counſel is correct, it would equally prevent this court from taking cognizance of a writ of error in that caſe, as in this.

Beſides, the queſtion, whether a writ of error or appeal will, or will not, lie upon a caveat, does not affect the title to the land; and the act of aſſembly of Virginia of December, 1789, was only intended to protect the rights to land in Kentucky acquired under the laws of Virginia. It ſays, "*the rights and intereſts* of lands ſhall be deter- "mined by the laws now exiſting," and does not ſay that Kentucky may not give a further *remedy*.

3dly. A right of appeal upon a caveat *did* exiſt in Virginia at the time of paſſing the act of aſſembly of December, 1789, ch. 53. reſpecting Kentucky. By the act of the Virginia aſſembly, October 1788, ch. 67. ſect. 11 and 12. the cognizance of caveats was given to the diſtrict courts, and by the 16th ſection of the ſame act an appeal is allowed *as of right* in all caſes. The act of December 12, 1792, ſect. 6 and 9. rev. code, p. 80, 81. re-enacts thoſe clauſes of the act of 1788.

Maſon for defendant in error.

It is not denied that the acts of congreſs are in many caſes paramount to the laws of the individual ſtates; but even a *general* poſition of that kind will not decide the preſent queſtion. This action was brought in a ſtate court, under a ſtate law, before congreſs legiſlated upon the ſubject, and even before congreſs, or the conſtitution of the United States, had an exiſtence. Can ſuch an action be effected by ſubſequent acts of congreſs?

The law by which Kentucky was erected into a ſeparate ſtate paſſed the Virginia legiſlature in December, 1789. This is an unalterable law, embracing the citizens

of both ſtates. It is a compact by which they mutually agreed that the rules of property ſhould not be altered. If we admit that by the act of 1792, appeals were allowed in the caſe of caveats, the admiſſion proves nothing in the preſent queſtion, becauſe the law of 1789 is an unalterable law, and confined to the then exiſting ſtate of things. It was not in the power of one of the contracting parties to change the terms of the compact.

But it is ſaid that there was a right of appeal at the time of that compact. Let us examine the laws relative to this ſubject. The firſt act is that of 1779, mentioned by the oppoſite counſel, which declares that caveats ſhall be tried in the general court, and that there ſhall be no appeal or writ of error The next is the act of 1788, which transfers the juriſdiction of the general court to diſtrict courts, and declares that "they ſhall have the "*ſame* juriſdiction concerning" "caveats" "as the gene-"ral court heretofore had by law." But the juriſdiction which the general court heretofore had by law was an *excluſive* and *final* juriſdiction, from which there could be no appeal. If then the diſtrict courts were to poſſeſs the *ſame* juriſdiction, it muſt be an *excluſive* and a *final* juriſdiction. But it is ſaid that by the ſame act of 1788, an appeal in all caſes from the diſtrict court was a matter of right. This muſt evidently mean in all caſes where a right of appeal before exiſted from the general court to the court of appeals; but cannot be underſtood to give an appeal in a caſe where it had been *expreſsly* excluded by an exiſting law. The intention of the legiſlature was to put the diſtrict court, as to all caſes ariſing within the diſtrict, exactly in the place of the general court, and to give them the ſame juriſdiction, to be exerciſed in the ſame manner, with the ſame limitations, and liable to appeals only in the ſame caſes. But the act of 1788, erecting diſtrict courts on the *eaſtern* waters, did not affect Kentucky. The legiſlature had before, by an act paſſed in 1782, erected a court on the *weſtern* waters, called the ſupreme court for the diſtrict of Kentucky, to which it had transferred all the powers and juriſdiction theretofore exerciſed by the general court of Virginia; and with the reſt, the power to try caveats and to give judgment thereon, without *any appeal* or writ of error to their judgment. The act of 1788 did not take away the

WILSON v. MASON.

exclusive cognizance which the supreme court of the district of Kentucky had respecting caveats, but they retained it till the final separation of Kentucky from Virginia; after which the legislature of Kentucky passed no law authorizing an appeal; so that under the state laws, it is clear that no appeal or writ of error would lie. There being then no appeal under the state laws, the question will be simply whether a writ of error will lie to the district court of the United States for the Kentucky district, upon an action carried there from the state court, which, under the laws of the state, had a final and exclusive jurisdiction of the cause.

The 22d section of the judiciary act of 1789 (Laws of U. S. vol. 1. p. 61.) which allows appeals and writs of error generally, did not contemplate a case like the present. This court is bound to take notice of the laws of the several states. By the 34th section of the same judiciary act, p. 74, the laws of the several states are to be the rules of decision in cases where they apply. The remedy by caveat is given by the state law, and the party who chooses to take that remedy must take it with its condition annexed, that no appeal or writ of error shall be allowed. A purchaser under the commonwealth of Virginia acquires his right under this condition. It is a part of the contract from which this court cannot absolve him. The parties to this suit are not the only parties interested in this question; for while the right is hung *in dubio*, whilst it is uncertain to whom the grant ought to issue, the state taxes cannot be collected, the commonwealth having no tenant to whom to resort. Wilson has sought the summary process by caveat, and ought to be bound by the restrictions of that law under which he claims his remedy. He was not compelled to use the summary remedy, he might have resorted to chancery, and then the commonwealth would have had a tenant to pay the taxes. He ought not to have the benefits of this kind of process without submitting to the inconveniences which may be supposed to attend it. If this opinion is correct, although the laws of the United States provide generally that writs of error may be had, they can only give them as a remedy where a right exists; and if Wilson's right is gone by the judgment of the court below, he is precluded from suing it out, by the statute under which he claims.

Lee, in reply.

This caveat is brought from the diſtrict court of the United States, and not from a ſtate court. It is true that it originated in the ſtate court, but it was the defendant Maſon, and not Wilſon the paintiff, who brought it into the court of the United States; and if the judgment of that court becomes thereby liable to be reverſed upon a writ of error, it is a conſequence attributable to the act of Maſon alone.

There is nothing peculiar in the nature of the proceeding by caveat, to exclude it from the general appellate juriſdiction which is given to this court by the conſtitution and laws of the United States. It is not true that this court are to look into the laws of Virginia for their right to correct the errors of the inferior courts of the United States. When a cauſe is brought from a ſtate court into a court of the United States, it is to be proceeded upon as if it had originated in the latter court, and the act of congreſs has expreſsly provided for an appeal or writ of error in the very caſe of an action removed from a ſtate court into an inferior court of the United States. Unleſs this caſe can be ſhewn to be within ſome expreſs exception to the general rule, none ought to be preſumed by implication. With regard to the compact between Virginia and the inhabitants of Kentucky, it is true that in all matters of ſubſtance, where the right of property depends upon it, it is binding upon this court; but in matters of form only, it could never receive the ſtrict conſtruction contended for, even between the parties themſelves. The reaſoning of the oppoſite counſel would go to prove that every caveat, depending upon the laws of Virginia, muſt be tried in the courts of Virginia only, becauſe they had the ſole right of trying a caveat, at the time of the compact. It would prevent the ſtates of Virginia and Kentucky forever from modifying and regulating their ſyſtem of courts, and neither ſtate could ever afterwards authorize an appeal upon a caveat.

But an appellate juriſdiction on caveats did exiſt in Virginia at the time of the compact. It appears by the act of congreſs, vol. 1. p. 278, that Kentucky did not become an independent ſtate till June, 1792. The county

WILSON v. MASON.

courts of Virginia had before that time cognizance of caveats as to lands within their reſpective counties. *Laws of Virginia, rev. code, p.* 92, §. 11, *and in p.* 88, §. 53, an appeal is given from the county courts to the diſtrict courts in all caſes of a certain value, or where the title of land is drawn in queſtion; and in *p.* 69, §. 14, an appeal or writ of error is allowed from the diſtrict courts to the court of appeals, in the ſame manner as from the county to the diſtrict courts.

As to taxes, the ſtate may tax the land before any patent has iſſued, if they think proper. It is not neceſſary that there ſhould be a tenant.

The court directed the counſel to proceed in the further argument of the cauſe, obſerving that they would conſider this point with the others.

Lee for the plaintiff in error.

The queſtion is who has the better right to the grant for 8,300 acres of land, ſurveyed for George Maſon, on the 2d of October, 1783.

1ſt. The deciſion of this controverſy depends on the laws of Virginia preſcribing the terms and manner of acquiring title to waſte and unappropriated lands; with which there muſt be a legal and exact compliance.(A) Ac-

(A.) The following is the ſubſtance of thoſe parts of an act of aſſembly, which are material to this cauſe, contained in the chancery reviſion of the laws of Virginia, publiſhed in 1785, by order of the general aſſembly, p. 94, entitled "An "act for eſtabliſhing a land-office, and aſcertaining the terms "and manner of granting waſte and unappropriated lands," May ſeſſion, 1779.

The preamble recites, "Whereas there are large quantities "of waſte and unappropriated lands within the territory of "this commonwealth, the granting of which will *encourage* "*the migration* of foreigners hither, *promote population, increaſe* "*the annual revenue*, and *create a fund* for diſcharging the pub-"lic debt, Be it enacted," &c.

§. 1. That an office be conſtituted for the purpoſe of granting lands, and a regiſter of the *ſaid land-office* be appointed, &c.

§. 2. "That any perſon may acquire title to ſo much waſte "and unappropriated lands as he or ſhe ſhall deſire to purchaſe, "paying

cording to these laws there must be a *warrant*, an *entry* and a *survey*: the warrant being the foundation of the entry, and the entry directing and controlling the survey. If the

" on paying the consideration of £. 40 for every 100 acres, " and so in proportion," &c.

§. 3. Register to grant printed warrants under his hand and seal of office, specifying the quantity of land, and the rights upon which it is due, authorizing any surveyor duly qualified according to law to lay off and survey the same, " which " warrants shall be always good and valid until *executed by* " *actual survey*:" no warrant to be issued other than pre-emption warrants, before 15th October, 1779. No surveyor to admit the entry or location of any warrant before 1st May, 1780. A surveyor to be appointed in every county.

" Every person having a land-warrant founded on any of " the before mentioned rights, and being desirous of locating " the same on any particular waste and unappropriated lands, " shall lodge such warrant with the chief surveyor of the " county wherein the said lands or the greater part of them " lie, who shall give a receipt for the same, if required. " *The party shall direct the location thereof so specially and precisely,* " *as that others may be enabled with certainty to locate other war-* " *rants on the adjacent residuum; which location shall bear date on* " *the day on which it shall be made, and shall be entered by the sur-* " *veyor in a book to be kept for that purpose, in which there shall be* " *left no blank leaves or spaces between the different entries.*"

" The surveyor at the time of making the survey shall see " the same bounded plainly by marked trees, except where " a water course or ancient marked line shall be the boundary, " and shall make the breadth of each survey at least one- " third of its length in every part, unless where such breadth " shall be restrained on both sides by mountains unfit for cul- " tivation, by water courses, or the bounds of lands before " appropriated. He shall, as soon as it can conveniently be done, " and within three months at farthest after making the sur- " vey, deliver to his employer, or his order, a fair and true " plat and certificate of such survey, the quantity contained, " the hundred (where hundreds are established in the county " wherein it lies) the courses and descriptions of the several " boundaries, natural and artificial, ancient and new, ex- " pressing the proper names of such natural boundaries, where " they have any, and the name of every person whose " former line is made a boundary; and also the nature of the " warrant and rights on which such survey is made. The said " plats and certificates shall be examined and tried by the said " principal surveyor whether truly made and legally propor-

" tioned

WILSON v. MASON.

entry be made without a warrant, or if the ſurvey be made of other land than that deſcribed in the entry, in either caſe there is a defect of title.

" tioned as to length and breadth, and ſhall be entered " within three months at fartheſt after the ſurvey is made, in " a book, well bound, to be provided by the court of his " county, at the county charge."

" Every perſon for whom any waſte or unappropriated lands " ſhall be ſo located and laid off, ſhall, within twelve months " at fartheſt after the ſurvey made, return the plat and cer- " tificate of the ſaid ſurvey into the land-office, together with " the warrant on which the lands were ſurveyed, and may de- " mand of the regiſter a receipt for the ſame, and on failing " to make ſuch return within twelve months as aforeſaid, or " if the breadth of his plat be not one-third of its length, as " before directed, it ſhall be lawful for any other perſon to " enter a *caveat* in the ſaid land-office againſt the iſſuing of " any grant to him, expreſſing therein for what cauſe the " grant ſhould not iſſue; *or if any perſon ſhall obtain a ſurvey of* " *lands, to which another hath by law a better right, the perſon* " *having ſuch better right, may in like manner enter a caveat* to " prevent his obtaining a grant until the title can be deter- " mined; ſuch caveat alſo expreſſing the nature of the right " on which the plaintiff therein claims the ſaid land. The " perſon entering any caveat ſhall take from the regiſter a cer- " tified copy thereof, which, within three days thereafter, " he ſhall deliver to the clerk of the general court, or ſuch " caveat ſhall become void; the ſaid clerk, on receiving the " ſame, ſhall enter it in a book, and thereupon iſſue a ſummons, " reciting the cauſe for which ſuch caveat is entered, and re- " quiring the defendant to appear on the ſeventh day of the " ſucceeding court, and defend his right; and, on ſuch proceſs " being returned executed, the court ſhall proceed to determine " the right of the cauſe in a ſummary way, without pleadings " in writing; empanelling and ſwearing a jury for the find- " ing of ſuch facts as are material to the cauſe, and are not agreed " by the parties; and ſhall thereupon give judgment, *on which* " *no appeal or writ of error ſhall be allowed;* a copy of ſuch " judgment, if in favour of the defendant, being delivered " into the land-office, ſhall vacate the ſaid caveat; and if not de- " livered within three months, a new caveat may for that cauſe " be entered againſt the grant; and if the ſaid judgment be " in favour of the plaintiff, upon delivering the ſame into the " land-office, together with a plat and certificate of the ſur- " vey, and alſo producing a legal certificate of new rights on " his own account, he ſhall be entitled to a grant thereof; " but on failing to make ſuch return and produce ſuch certifi- " cates within ſix months after judgment ſo rendered, it ſhall

" be

In this caveat one of the cauſes aſſigned is, that the ſurvey of Maſon was made contrary to his entry, and this we conceive to be a fatal defect in his title.

2d. The entries made on the 29th of April, 1780, by G. Maſon (from whom the defendant derives his title) of his two warrants, No. 1, for 8,400 acres, and No. 2, for 8,300 acres, were valid and ſufficient entries of land on the *eaſt* ſide of Panther creek, and *above* the mouth of the weſt fork thereof, at the time thoſe entries were made. The entry of warrant No. 1 is "on 8,400 acres of land to be-"gin on Panther creek on the eaſt ſide thereof, oppoſite to "a beech on the weſt ſide, about four miles *above* the "mouth of the *weſt fork*, and to run up and down the ſaid "creek, and eaſtwardly for quantity."

The entry of warrant No. 2, is "on 8,300 acres to be-"gin at the upper corner of his 8,400 acre entry, and "run up the creek on the eaſt ſide, and back for quan-"tity."

3d. If the explanation made on the 27th of October, 1780, of the entry of warrant No. 1, on the 29th of April preceding, for 8,400 acres, was a ſubtraction thereof from the land to which it had been applied, a matter not clear of doubt, and therefore not admitted; yet the entry of warrant No. 2, upon 8,300 acres was not thereby af-

"be lawful for any other perſon to enter a caveat, for that "cauſe, againſt iſſuing the grant; upon which ſubſequent ca-"veats, ſuch proceedings ſhall be had as are before directed "in the caſe of an original caveat; and in any caveat where "judgment ſhall be given for the defendant, the court ſhall "award him his coſts;" "and in caſe the plaintiff in any ſuch "caveat ſhall recover, the court may, if they think it rea-"ſonable, award coſts againſt the defendant."

"*And for preventing haſty and ſurreptitious grants, and avoiding* "*controverſies and expenſive law ſuits, be it* enacted, that no ſur-"veyor ſhall at any time *within twelve months* after the ſurvey "made, *iſſue or deliver any certificate, copy or plat of land, by him* "*ſurveyed, except only to the perſon or perſons for whom the ſame was* "*ſurveyed*; or to his, her or their order; unleſs a caveat ſhall "have been entered againſt a grant to the perſon claiming under "ſuch ſurvey, to be proved by an authentic certificate of ſuch "caveat from the clerk of the general court, produced to the "ſurveyor."

WILSON v. MASON.

fected, but remained unaltered, unimpaired and unsubtracted from the land which it describes with sufficient legal precision and certainty. The re-location of one warrant is not necessarily the re-location of another. If the warrant No. 1. was transferred by a new entry on the 27th of October, 1780, to land some miles *below* the west fork of Panther creek, yet the warrant No. 2. having been legally located, on the 29th of April antecedent, upon a tract of land some miles *above* the west fork, remained appropriated to that tract of land.

4th. The entry of 8,300 acres, under warrant No. 2, being such a special and precise entry as the law requires, is an appropriation of the land described in it; and fixes that warrant upon that tract of land, situate upwards of four miles *above* the west fork of Panther creek: and the *survey* made by Mason of 8,300 acres on the *south* side of Panther creek, and *below* the west fork thereof, and several miles below it, is not a survey of the same land contained in his entry.

A *survey*, of itself, without a previous legal entry of a land warrant, is not a *legal appropriation* of waste and vacant land; and therefore this survey, unsupported by a legal warrant and a legal entry, was no legal appropriatio , by Mason, of the land in controversy; but an unlawful intrusion thereupon; and the same land remained open to the appropriation of others, who, having notice of the illegal survey of Mason, were not precluded by law, or equity, from proceeding in due course of law to obtain title to the same land which is described in that illegal survey which had been knowingly made by the agents of Mason contrary to his legal entry. No grant of the land, therefore, ought to be made to the defendant Mason.

5th. If the claim of the defendant be deemed invalid, then there is no impediment in the way of the plaintiff whose warrants, whose entry, and whose survey are perfectly conformed to law.

The two causes assigned by Mason in his caveat against Wilson are resolvable into one, viz. that having notice of the *survey* of Mason, it was not equitable but fraudulent

to acquire a title to the ſame land which was contained in that ſurvey. But if the law be in favor of the plaintiff, equity is alſo: for notice of illegal proceedings in one man to acquire property, is no equitable bar to another who ſhall in all reſpects proceed according to law.

On the part of the defendant Maſon, there was full and complete knowledge of Green river, Panther creek, and the weſt fork; and with this knowledge, a ſurvey was made of a different tract than the one deſcribed and authoriſed by the entry No. 2, for the purpoſe of obtaining a grant, in evaſion and fraud of the law. Such illegal proceeding ought not to be ſuſtained in a court of juſtice againſt another who ſhall reſpect and obey the law in all particulars.

The entry of Maſon for 8,300 acres, on the 29th April, 1780, begins at the upper corner of his *entry* for 8,400 acres, as made on the ſame day. The entry for 8,400 acres, well and accurately deſcribed a tract of land lying on the *eaſt* ſide of Panther creek, oppoſite a beech on the weſt ſide, and *four miles above* the weſt fork. This entry being ſufficiently certain, the entry for 8,300 acres muſt be certain alſo, and deſcribes a particular tract of land lying more than four miles *above* the weſt fork.

The weſt fork was known by that name to the agent of Maſon at the time he made the entries on 29th April, having encamped thereabouts, four or five weeks in the winter and ſpring before he made the entries for Maſon. It has always been known by that name ſince the firſt exploring of that part of the country. He was informed, while the ſurveys were ſtill in his power, that they did not conform to his entries, and ſhewn the manner in which they differed, and yet he obſtinately perſiſted in having them recorded. The warrant No. 2, then was well and ſufficiently located on the land *above* the weſt fork, and a removal of the location of warrant No. 1, even if ſuch removal could be made according to law, could not be conſidered as a removal alſo of the location of No. 2, without an expreſs declaration to that effect. The location of warrant No. 1, was changed, but the location of No. 2, was not. Maſon has ſurveyed it as if it was; and hence reſults the fatal difference between

WILSON v. MASON.

his entry and his ſurvey; by which his ſurvey is a mere void act, and can not be the foundation of a claim to a patent.

But it may be ſaid perhaps, that Maſon's ſurvey of 8,300 acres, although not authoriſed by a previous entry, yet being made before Wilſon's entry, and Wilſon having notice of it, was good againſt Wilſon, as well as againſt the commonwealth. This is denied. As to the commonwealth it was an intruſion; and as to Wilſon the land was ſtill vacant, it not having been appropriated in the manner authoriſed by law. Before a grant for land has actually iſſued, the only record of appropriations is the ſurveyor's book of entries of locations. The book of ſurveys was not intended by the legiſlature as the book to reſort to for information as to appropriations; it furniſhed no evidence of that kind. And as to notice, the principle is well eſtabliſhed that notice of an illegal act, is no equitable bar to him who proceeds according to law. *Cowper* 280, *Chapman v. Emery*, and *Doe v. Routledge*, *Cowp.* 708, 711, 712, where lord Mansfield ſtates the reaſon for the principle to be, "*becauſe if he knew the tranſaction, he knew it was void by law.*" 5 *Co.* 60, *(b) Gooch's caſe.* 1 *Eq. ca. ab.* 334. *Tonkins & Ennis.* 2. *Eq. ca. ab.* 682. *Powell and Pleydell.*

Notice could not make that act valid which was void at law. A ſurvey is not the act of appropriation which the law requires. The land not being appropriated according to law, was ſuch waſte and unappropriated land as the act of aſſembly ſays any perſon may acquire a title to, on complying with the terms, and by taking the ſteps preſcribed by the act, and Wilſon or any other perſon might lawfully appropriate the land, by proceeding regularly according to law.

Maſon, then, not having taken the ſteps required by the act of aſſembly had no title at law; and having illegally made his ſurvey, with a full knowledge of all the circumſtances, and after having been warned of his error, has certainly no right in equity. Before he obtained a grant, Wilſon, by purſuing the ſteps of the law, acquired a *better right*, and was thereby intitled to bring his caveat, and obtain a judgment in his favor.

Daveiss, on the ſame ſide.

WILSON v. MASON.

Notice cannot alter the law, except where the law requires notice. Where a ſtatute requires notice and preſcribes the mode, notice in another mode is not ſufficient. 4 *Term. Rep.* 368. *King v. Newcomb. Amb* 444, 445.

This is a caſe in which Wilſon and Maſon are both contending *de damno evitando*. The jury have found that by a law paſſed by the aſſembly of Kentucky, in 1792, all further entries of land with the ſurveyors are prohibited, and that ever ſince no land could be appropriated by virtue of land warrants. Conſequently the principle applies, which is laid down by *lord Kaim, in his principles of equity, p.* 26, 27, 162, 163, 199, "that it is a univerſal law of "nature that it is lawful for one, *certans de damno evitando*, to take advantage of another's error." A warrant is a tranſitory chattel until it has been located according to law. The entry is the appropriation of a particular tract of land, and the fixing of the warrant to that tract. The ſurvey is of no effect, unleſs it be a ſurvey of the tract ſo appropriated. In ſupport of theſe poſitions he cited a manuſcript report of land caſes decided in the courts of Kentucky, *p* 2 *and* 3, *Swearingen v.*————*p.* 35. *Dougherty v. Crow*—61, 62, 63, *Iſaacs v. Willis*—268, *Owen v. Willſon*—77, 78, 79. *Kite v. Stevenſon*—182, 183. *Conſella v. Briſcoe*—199, *Swearingen v. ſame*—197, *Miller's heirs v. Fox*—200, *Smith v. Bradford*—206, 207. *Fry v. Eſſery*, and other caſes in pages 211, 212, 214, 222, 232, 236, 268, 302, 303, 337, 338, 343, 353, 354.

It will probably be contended by the defendant, that the intention of the aſſembly in requiring an entry, was to give notice to ſubſequent purchaſers; and that notice given or gained in any way is ſufficient. But it has been ſhewn that here was no appropriation by Maſon; and that the land until appropriated is waſte. The land law ſhews this becauſe nothing but a regular title is protected by that law. In a ſtatute introducing a new law, or preſcribing the mode of acquiring new rights; affirmative words imply a negative of all other modes of acquiring that right, or fulfilling the terms of that law. The land law by giving one way of acquiring titles, negatives all other modes. In 4 *Bac. Ab.* 641, it is ſaid, "If an af-

WILSON v. MASON.

"firmative ſtatute, which is introductive of any new law, "limits a thing to be done in one manner, it ſhall not, "even where there are no negative words, be done in "any other," and the following caſes are there cited.—*Stradling v. Morgan, Plowd.* 206, *(b)*—*Slade v. Drake. Hobart*, 298. *Wethen v. Baldwin. Sid.* 56. He cited alſo, *Thornby v. Fleetwood. Strange*, 329, and 3 *P. Will.* 458, 459, 460, 461. *The King v. Burrage.* Where a certain mode is pointed out by a ſtatute, in which a title may be obtained, a conformity to that mode is a condition precedent, without complying with which, no title can be obtained. In the preſent caſe a warrant, an entry, and a ſurvey are conditions precedent, and a want of either is fatal.

Lee.

In the 10th fact, found by the jury, for the plaintiff, it is ſtated, the ſurvey of 8,400 acres was made on the entry of 17th October, and that the ſurvey of 8,300 acres was made on the entry of 29th of April. This muſt prevent the defendant from arguing that the latter ſurvey was made on the entry of October, as well as from pretending that the entry of October applies to the entry of 8,300 acres made in April.

In order to prove that all lands, not entered for in a regular manner, were to be conſidered as *waſte* and *unappropriated*, he cited the caſe of *Jones v. Williams*, 1 *Waſh.* 231, in which the court call lands waſte and unappropriated, although they had been ſettled and occupied for years.

Maſon, for defendant in error.

1ſt. The entry of Maſon, upon which his ſurvey of 8,300 acres was made, is ſufficiently certain, and the ſurvey is in conformity to the entry.

2d. Admitting that the entry was vague, and not correſponding with the ſurvey, yet Maſon having paid for the land, and ſurveyed it, quoad the commonwealth, he was a bonâ fide purchaſer, for a valuable conſideration, and entitled to the land, provided no ſtep had been taken

by any other perſon to acquire title to this land, previous to Maſon's ſurvey.

3d. Maſon having appropriated this land by a ſurvey actually made, returned to the ſurveyor's office, and recorded, the land ceaſed to be waſte and unappropriated land: And Wilſon, having a perfect knowledge of theſe facts before and at the time he made his entry, was and is, (if he could acquire title at all) in the character of a ſecond purchaſer with notice of a prior ſale of the ſame land, and therefore was a fraudulent purchaſer.

4th. The plaintiff in error is not, under the proviſions of the law, entitled to a caveat in this caſe, becauſe the *better right*, which the law meant to protect, was a right exiſting before or at the time the ſurvey to be caveated was made.

1ſt The entry of 8,300 acres is ſufficiently certain, by its reference to the entry of 8,400 acres. The ſurveys of both entries are upon the identical tracts originally intended to be located. The firſt deſcription of them in April, 1780, was inaccurate on account of the miſtake in the names of places. The particular forks and branches had at that time ſcarcely acquired any names at all. The facts ſtated in this caſe do not admit that the names of the places were known before the *beginning* of the year 1780, which is the very time when the entries were made. It does not appear that the place now called the mouth of weſt fork was known by that name before Maſon made his entries. It may be a name ſince acquired, or given by the ſurveyor or his deputies, who are the perſons that generally give names to places in new countries. So ſoon as the fall of the ſame year Maſon found that the deſcription was not ſufficiently accurate, and made an explanatory entry declaring what place he meant by the *mouth of the weſt fork*, and ſtating it to be *the forks of Panther creek where it mouths into Green river*. A miſtake of that kind was by no means improbable, in the then wild and uninhabited ſtate of the country on and about Green river, when it was dangerous on account of the Indians to attempt to ſet a compaſs. That ſuch miſtakes were general is evident from the names of places which were given. Thus the *weſt* fork, is in fact a north-eaſt fork;

WILSON v. MASON.

what is called the east side of Panther creek, is truly the south-west side. The entry of April, was in substance, the location of the tract surveyed; and the memorandum of Mason in October, was only fixing with more accuracy what was before in some degree vague. If this was the fact, then the entry of October was not a re-location of the warrant; it was never removed, but was always fixed to one and the same spot of earth. If then the entry of October is nothing more than it purports to be, viz. an explanation of the name of a place which was before uncertain, this same act of explanation which rendered certain the location of warrant No. 1, must of necessity also render certain the location of No. 2, which depends, for its beginning, upon the location of No. 1. *Id certum est quod certum reddi potest.* The two locations are dependent upon and connected with each other; and the explanation of the first must also explain the second. It is evident that it was Mason's intention that the two tracts should lie along side of each other, and the rendering certain the first, upon which the second was dependent, could never be considered as withdrawing the one from the other, and placing them many miles asunder. If it was Mason's intention in October to make a new location why did he not avow it? No person had applied to appropriate the land he wanted. No one had interfered, or was about interfering to take up that tract. There was nothing to prevent him from expressly withdrawing the entry of April, and making an entire new location. But his object was not to remove the location which he had actually made, but only more fully to explain the ideas which he had at first intended to express, but which on account of the inaccurate knowledge of the names of places and of the real geography of the country, he had failed to do. Taking then the entry of October as an explanation only, it applies as well to fix the true location of warrant No. 2, as of No. 1; and the survey of No. 2, is as correspondent to its entry, as that of No. 1, is to its entry.

Nothing can more clearly prove Mason's intention to be to explain, and not to remove his entries of April, 1780, than his omitting to say any thing respecting his former entry of 8,300 acres, at the time he was explaining the entry of 8,400. Because having no idea that his act

would be conſtrued to be any thing more than an explanation, it muſt apply as well to the former as to the latter. But if his intention had been to remove the location of warrant No. 1, he would either have expreſsly removed No. 2, at the ſame time, or elſe would not have ordered the *ſurvey* of No. 2, to be made contiguous to that of No. 1. He might as eaſily have explained No. 2, as No. 1.

Words are but the repreſentatives, and not always the true repreſentatives, of ideas. They do not always expreſs, nor are they the uncontroulable evidence of the ideas of the perſon uſing them. They may be explained by the tone of the voice, by the emphaſis, by the geſtures, or by the actions of the perſon ſpeaking. To determine, at a ſubſequent period of time, the nature of the act from the words uſed, and not to ſuffer the words to be explained by other proof of the nature of the act, is not a fair mode of ſeeking for truth.

The queſtion is, what particular ſpot did Maſon mean to locate by his entry of April? He has himſelf anſwered the queſtion by his explanation in October. The only doubt can be whether he ſpoke the truth. He certainly had no motive for deception. There were then no contending claims. No other perſon had attempted to locate the land which he wiſhed to appropriate. He had no reaſon to wiſh to preſerve the priority of his entries, becauſe the book of entries was open before him and he could ſee that no perſon had entered for the ſame land; a new entry therefore in October would have been as good as his old entry in April.

The act of aſſembly ſays that the warrant "*ſhall be good and valid until executed by actual ſurvey.*" The ſurvey then, and not the entry is the *execution* of the warrant. The warrant merges in the ſurvey. This ſhews that the legiſlature attached greater importance to the ſurvey, than to the entry.

If then the land ſurveyed, is the ſame land which Maſon fixed his eye upon, but inaccurately deſcribed in April, then the ſurvey was correctly made and purſuant to the actual location.

WILSON v. MASON.

2d. But admitting, for the ſake of argument, that the ſurvey did not correſpond with the entry, yet Maſon having paid the money for the land, and ſurveyed it, he was, as to the commonwealth, a bona fide purchaſer, for a valuable conſideration and entitled to a grant of the land. The commonwealth could not refuſe, becauſe the want of an entry was no injury to her. Maſon had his choice among all the waſte and unappropriated land in the ſtate. It was of no importance to the commonwealth, whether he took this tract or another. The commonwealth ſold all her land at the ſame price. The land was waſte and unappropriated, and the warrant being executed by actual ſurvey was ſpent and gone, *functus officio*. The commonwealth had no means to prevent the emanation of a grant. As between the commonwealth, therefore, and Maſon, this was a contract, for that ſpecific tract of land. It was as if the warrant had been ſpecial, for that particular land. The warrant, having been originally general, became ſpecial, as againſt the commonwealth, by the ſurvey. The land ceaſed to be waſte and unappropriated, as to the commonwealth, who was bound by the ſurvey and could not ſell it to another.

3d. This being the caſe, and Wilſon having a full knowledge of all theſe facts before he made his entry, became a malâ fide purchaſer. This is one of the grounds upon which judge Innes decided the caſe; (here the opinion of judge Innes was read, with the authorities there cited.) As a ſecond purchaſer with notice, he could take only the right which the commonwealth had, ſubject to the contract with Maſon.

The preamble of a ſtatute is ſaid to be a key to unlock its meaning. It appears by the preamble of the act of 1779, to have been the object of the legiſlature, 1ſt to encourage migration, and to promote population; 2d to increaſe the revenue.

To induce perſons to become purchaſers it became neceſſary to ſecure their titles, and for this purpoſe, as the ſituation of the country would not permit them in all caſes to make actual ſurveys, an entry, or location of the land entered in the ſurveyor's books, was to be conſidered as equivalent to a ſurvey, for the purpoſe of appropri-

ating the land and ſecuring a title. A ſurvey, returned and recorded, is, in itſelf, a more unequivocal act of appropriation than an entry, and the law has made it the only means of executing the warrant. No time is fixed by law for the making the ſurvey, becauſe in many parts of the ſtate it was at that time impoſſible to make it, on account of Indians, and no time could be aſcertained with any degree of preciſion when it would become poſſible. For the ſecurity of ſubſequent purchaſers, it alſo became neceſſary that ſome means of notice ſhould be preſcribed, that they might avoid an interference with prior rights. Hence it was enacted that the locations of warrants ſhould be entered in a book, and ſhould be ſo ſpecial that others might be enabled, with certainty to locate other warrants on the adjacent reſiduum. The objects of the commonwealth in requiring *entries* was not to ſecure her own immediate intereſt, but that of purchaſers, by giving them notice: and if the ſubſequent purchaſer acquires ſuch notice, it is of no importance whether it be by an entry which was liable to be changed, or by an actual ſurvey recorded, which was a complete execution of the warrant and could not be altered. Indeed the latter ſeems to be the more complete and effectual notice, and to anſwer the intention of the legiſlature better than notice by an entry only.

The other object of the legiſlature was to raiſe money. If then complete notice of the location was given to the ſubſequent purchaſer, and the money paid to the commonwealth, the two objects of the legiſlature were fully anſwered, and neither the commonwealth nor that ſubſequent purchaſer had any right to complain. No injury was done to either. The perſon who with full notice of theſe facts, inſiſts upon becoming a ſecond purchaſer, becomes ſuch in his own wrong, and if a loſs muſt fall upon either, it muſt light upon him, who thus voluntarily put himſelf in danger. Where the object of a ſtatutory proviſion is only to give notice, if notice is had by other means, it has the ſame effect as if given in the mode required by the ſtatute. Such have been the uniform deciſions in England on the ſtatutes of inrollment, and ſo well eſtabliſhed is the doctrine that it can not be neceſſary to cite authorities to ſupport it. Although where a new right is given by ſtatutes, a ſtrict compliance with the

WILSON v. MASON.

provisions of the statute is necessary, yet it is not necessary for every purpose. *Blackwell v. Harper*, 2 *Atk.* 94, 95. Mrs. Blackwell having designed and engraved certain drawings of plants, but omitted to engrave on the plate the day of their first publication, as required by the statute, lord chancellor Hardwicke decreed a perpetual injunction against Harper, notwithstanding that omission; but did not decree an account of the profits.

It will not be forgotten that Handley, a deputy surveyor of the county, was the partner of Wilson in this business, and was the person who actually made the entry, and that he fraudulently took advantage of the knowledge of Mason's surveys, which he acquired by means of his official situation, contrary to the express provisions and spirit of the act of assembly of 1779, which enacts, that "*for* "*preventing hasty and surreptitious grants and avoiding* "*controversies and expensive law suits*, no surveyor shall at "any time within twelve months after the survey made, "issue or deliver any certificate, copy or plat of land by "him surveyed, except only to the person for whom the "same was surveyed." This clause of the act was made for the very purpose of preventing others from taking that advantage of surveys which the deputy surveyor himself has here taken; the law not contemplating the case of a surveyor so regardless of his duty and of his oath as to be guilty of an act like this. A title thus founded in fraud can never be supported. Upon a caveat the court is to exercise a chancery jurisdiction. The act says "the court shall proceed to determine *the right* "*of the cause in a summary way*." This they cannot do without chancery powers. The court in Kentucky has so construed the act, *M. S. S. reports*, *p.* 60, *Isaacs v. Willis*, and also in *page* 224.

If Wilson, by pursuing the strict letter of the law, has acquired any thing like a *legal* right, the court, as a court of chancery, will consider those circumstances of fraud which go to invalidate his right in equity.

4th. Wilson is not, under the provisions of the law, entitled to a caveat in this case.

The proceeding by caveat is in derogation of the common law, and therefore the act which authorizes it is to

be conſtrued ſtrictly. The act mentions only four caſes in which a caveat may be entered. 1ſt. If the plat and certificate of ſurvey be not returned into the land office within twelve months after the ſurvey made, it ſhall be lawful for any other perſon to enter a caveat. 2d. If the breadth of the plat be not one third of its length. 3d. If any perſon ſhall obtain a ſurvey of lands to which another hath, by law, a better right. 4th. When upon a caveat judgment ſhall be given for the defendant and he ſhall not lodge a copy of that judgment in the land office within three months thereafter. In the 1ſt, 2d and 4th caſes the caveat is allowed for the purpoſe of protecting the rights of the commonwealth; they do not apply to the preſent queſtion In the 3d caſe the caveat is given as a remedy to him who hath by law a better right, and it is upon this ground that Wilſon claims the proceſs.

If we examine the words of the law according to their grammatical conſtruction, or compare them with the ſpirit and object of the law, we ſhall find that the better right which can ſupport a caveat, muſt be a right exiſting at the time of the ſurvey obtained, and not a right ariſing afterwards. The words of the act are "if any perſon *ſhall obtain a ſurvey of lands* to which another *hath* by law a better right." The word *hath* is in the preſent tenſe, and muſt apply either to the time of paſſing the law, or to the time of committing the injury which is the cauſe of the caveat. It could not apply to the time of paſſing the act, becauſe at that time there exiſted no rights to thoſe waſte and unappropriated lands which were the ſubject of that act. The *better right* then, was a right to be derived under that law. The injury to be remedied by the caveat was the injury done by a ſurvey of lands to which another ſhould have a better right. But a ſurvey of lands, to which no other perſon had a right, can not be an injury to any one, and can be no ground for a caveat. As to Wilſon's being in the ſituation of one *certans de damno evitando*, the aſſertion can not poſſibly be deemed correct. If he is in danger of loſs, he has knowingly put himſelf in danger; he has ſought the poſition he is in, with a full foreknowledge of all its evils. He was under no neceſſity of interfering with Maſon's claims. His warrant was general. The wilderneſs was before him, and he knew where Maſon had ſurveyed his land.

WILSON v. MASON.

The ſame lord Kaim, who ſays, "no man is conſcious of "wrong when he takes advantage of an error committed "by another, to ſave himſelf from loſs," ſays alſo in the ſame breath, "but *in lucro captando*, the moral ſenſe "teaches a different leſſon. Every one is conſcious of "wrong when an error is laid hold of to make gain by it. "The conſciouſneſs of injuſtice, when ſuch advantage is "taken, is indeed inferior in degree, but the ſame in "kind with the injuſtice of robbing an innocent perſon "of his goods or his reputation." Here Wilſon evidently had an intention of making gain by the error of Maſon; and if by that means he has put his purchaſe money at riſk, it is not for a court of law or of equity to be anxious to aſſiſt him. Wilſon, finding that Maſon had an advantage by the priority of his location, contrived (by the aſſiſtance of Handley, his fraudulent coadjutor) a plan by which he hoped to reap the fruits of Maſon's induſtry; and now he would fain make the court believe he was an innocent purchaſer, ſtriving to avoid a loſs, the danger of which he had incurred by pure miſadventure.

Upon the whole then, Maſon having obtained a right to this tract of land againſt the commonwealth, and Wilſon having notice of that right, before he purchaſed, has no claim at all; but if he had, his remedy is not by caveat.

Jones, on the ſame ſide.

This cauſe naturally divides itſelf into two queſtions.

1ſt. Whether Maſon has acquired a right to the patent.

2d. If Maſon has not, whether Wilſon has; for if neither has a right, Wilſon can recover nothing.

The entry of Maſon in April, 1780, is ſuppoſed to be ſo abſolutely binding upon him, that he could not alter it without withdrawing it entirely, notwithſtanding that he ſubſequently ſaid he was miſtaken in ſuppoſing the land to lie above the weſt fork, when in fact it was below. A man may go upon the land and fix in his mind a certain tract, but when he goes to the ſurveyor's office he may miſtake its ſituation, and ſay it is on the eaſt when it lies on the weſt, or the north when it lies on the ſouth; but

when he diſcovers his miſtake, an explanation is no evidence that his choice has been altered. Here is no proof of an intention to withdraw his firſt entry; or to appropriate a different tract of land from that which he firſt intended. The only evidence which can be drawn from the entry of October is, that he had been miſtaken as to the point of compaſs, and as to the name of a particular fork of Panther creek. The land which he had choſen lies above a branch of Panther creek which he ſuppoſed to be called the Weſt Fork, but which is not now known by that name. Maſon was one of the firſt, if not the very firſt adventurer in the lands on Panther creek. There is no evidence that particular branches of that creek had names given them before he made his entries in April. He had as good a right to give names to places as any one elſe.

But a ſurvey itſelf is as good a location as an entry. Indeed it is better, becauſe it is an actual location and occupation of the land. The lines are not merely deſcribed by words which are uncertain, but are marked out upon the land itſelf. It is a *pedis poſſeſſio*, an actual ſeizen. A ſurvey differs from an entry as a diagram differs from a problem; or a propoſition from its demonſtration. If notice is the object of the ſtatute, a ſurvey recorded is better than an entry, as it is more definite and certain. If the object is to give evidence of an appropriation, it is better than an entry in the ſurveyor's book, becauſe it is an act in pais, an actual poſſeſſion. The one is but the command to locate, the other is the location itſelf.

In this caſe entry does not conflict with entry, and ſurvey with ſurvey; but a prior ſurvey and occupation, with a ſubſequent entry.

A ſtrong difference is made by the act of aſſembly between a ſurvey and an entry. The firſt is a ſatisfaction of the warrant; and various clauſes of different acts ſpeak of a ſurvey as the *execution* of the warrant. But the entry does not affect the warrant, which is declared to be "*always* "*good and valid until executed by actual ſurvey.*" The entry therefore is but an intermediate proceſs by which the party gains a priority of right; it is ntended merely as a ſubſtitute for a ſurvey, until an "*actual ſurvey*" can be

WILSON v. MASON.

made. If, therefore, there had been no entry at all, yet Maſon's right is equally good as if his entry had been free from queſtion. He has done the principal act itſelf, for which an entry is only a temporary ſubſtitute. Perhaps he ran ſome riſk before his ſurvey was obtained; but when a ſurvey is completed the warrant and the entry are no longer of any effect or validity; they merge in the ſurvey as the ſurvey does in the patent.

2d. With reſpect to the plaintiff's right, it ſeems clear that it muſt be a right exiſting at the time of the ſurvey.

If we were diſſeizers, as it is contended, then we gained a defeaſible inheritance. We had poſſeſſion, and whether legal or not, is of no conſequence, it was a better right than Wilſon's, and good againſt all the world but the lawful owner.

The acquiſition of a legal title takes away the remedy by caveat. The warrant, entry and ſurvey, conſtitute only an incipient equitable title, to be completed by the patent, which a caveat is the proper proceſs to arreſt. This being then entirely a conteſt about equitable rights, the proceſs by caveat muſt be an equitable remedy, and gives the court an equity juriſdiction.

If this caveat had not prevented, there is no doubt that Maſon, having obtained and returned his ſurvey in due time, would have had a patent as a matter of courſe.

Suppoſe the commonwealth had attempted, like any other vendor, to defeat the claim of Maſon, would not a court of chancery have compelled a conveyance? Every thing had been done by Maſon which the commonwealth had a right to require; as againſt her therefore there muſt have been a decree. If ſo, then this court, exerciſing the ſame chancery powers with the court below, will give the ſame judgment which that court has rightfully given, in deciding that a contract exiſted between Maſon and the commonwealth which a court of chancery would have carried into effect; and that Wilſon having a full knowledge of that exiſting contract, became a ſubſequent purchaſer; and, therefore, as to Maſon he was a purchaſer malâ fide, and can never defeat the right of Maſon.

Daveiſs, in reply.

Can lands be appropriated in more ways than one? If it is decided that the mode of appropriation is *unique*, then there can be no tantamount act. The one mode pointed out by the ſtatute muſt be purſued. In attempting to come at the true conſtruction of the land law of 1779, it is highly important to take into conſideration the act which immediately precedes it, for the ſettling of certain then exiſting claims and rights. They may indeed be called twin acts, being paſſed on the ſame day, and referring to each other. The preamble of the firſt act recognizes the great variety of claims, and the evils reſulting from various modes of gaining a title to lands; to remedy which it declares it to be neceſſary "*that ſome cer-*" *tain rule ſhould be eſtabliſhed*," &c. The legiſlature, after ſettling exiſting claims, go on to provide a mode of acquiring titles in future, and to fix certain rules which ſhould be obſerved by all future purchaſers of public lands. The great evil intended to be remedied, was the exiſtence of multifarious modes of acquiring titles. To give the act its proper remedial effect, it muſt be conſtrued ſtrictly; otherwiſe the evil would continue to be as great as ever. For if you once decide that titles may be acquired in any other mode than that pointed out by the ſtatute, you open again that door to perplexity and ambiguity which the legiſlature intended to cloſe forever.

It may not be improper here to remark, that no objection has been raiſed to the *intrinſic* merits of Wilſon's claim. All the objections ariſe from its relation to Maſon's. Wilſon, therefore, has an intrinſic legal claim, which nothing can defeat but a prior appropriation of the land. This brings us again to the great queſtions, *what is a legal act of appropriation?* and what lands can be called *waſte and unappropriated?*

To aſcertain the meaning of theſe expreſſions it is not neceſſary to conſult a gloſſary. The manner in which the legiſlature has uſed them on various occaſions will leave no doubt upon the ſubject. Sometimes they call land waſte and unappropriated after it has been ſettled, and ſometimes even after it has been cleared and cultivated; and lands once legally appropriated by legal entry, may

WILSON v. MASON.

again become waſte and unappropriated by the purchaſer's not following exactly the proviſions of the law. Hence it is apparent that when the legiſlature uſe the terms waſte and unappropriated land, they mean lands not appropriated in the manner preſcribed by law.

We are then to enquire whether, at the time of Wilſon's entry, the land was ſuch waſte and unappropriated land, as, by the act of aſſembly, Wilſon had a right to appropriate.

We contend that an entry is eſſential, and that Maſon never entered for the land in diſpute. The entry called for by the ſurvey is the entry of April, 1780. That is clearly an entry for other land. It is a certain and a ſpecial entry. Its beginning is certain, and is above the weſt fork. The ſurvey is ſome miles below the weſt fork. But we are told the name of weſt fork is uncertain. That the fork ſo called is not a weſt fork, but a north-eaſt fork. But a name is different from a deſcription. The name is arbitrary, and as long as a thing is known by a particular name, it is of no importance what that name is.

But ignorance of the country and the danger of acquiring accurate knowledge of it, are alleged both as a proof of, and an apology for the vagueneſs of the entry. If evidence and excuſes of this kind are to be allowed, they will totally defeat the proviſions of the law. It will let in thoſe looſe and vague claims which it was the object of the legiſlature to prevent. It is begging the queſtion to argue that Maſon was under a miſtake becauſe he choſe to alter his entry; and that what was originally in itſelf certain, was uncertain, becauſe Maſon by a ſubſequent act choſe ſo to conſider it. But there was a reaſon why Maſon ſhould wiſh to give it the appearance of a miſtake rather than of a removal of his entry. If he had expreſsly withdrawn his former entry, he would have loſt his priority; and to ſave himſelf the trouble of examining all the intermediate entries, as well as the riſk of omitting any of them, he choſe to hold up the idea of correcting a miſtake.

The entry of April then, being ſufficiently certain, the warrant attached itſelf to it, and the warrant and

entry taken together had the ſame effect as a ſpecial warrant deſcribing that identical tract of land. If Maſon had bought, or could buy a ſpecial warrant ſtating deſcriptively the land, he could have no other land than that deſcribed in his warrant. When he bought his general warrant he had the power of fixing its location at his election; having made his election, the power is expended, and the location fixed.*

But it is contended, that if the entry for 8,400 acres was removed, the entry for 8,300 was removed alſo; that the one is dependent on the other. This we deny. How is it dependent? Can not one exiſt without the other? Or is it becauſe both were made by one perſon? Suppoſe the entry of warrant No. 2. had begun at a mile diſtance due north from the upper corner of entry No. 1. Would the removal of No. 1. be a removal of No. 2?

The deſcription of the beginning of No. 2. was only a deſcription of a certain place, as was that alſo of No. 1. and his removal of the location of warrant No. 1. did not alter that place. Suppoſe you make an entry, the beginning of which is a certain natural boundary. I make an entry beginning at the north corner of yours. You afterwards remove your entry. Does mine follow yours whether I will or not? Again, it is ſaid that No. 2. could not be ſurveyed without ſurveying No. 1. But this can make no difference, it might make ſome additional trouble, but creates no impoſſibility. The lines of No. 1. may be run ſo as to aſcertain the beginning of No. 2.

It is ſaid that a ſurvey is as good an act of appropriation as an entry, and equally anſwers all the objects of the ſtatute. This might be a good argument, if the court could make laws; but the law does not ſo conſider it. It limits no time in which the ſurvey ſhall be made. The ſurvey, therefore, can not be conſidered as the act of appropriation. By the old land law, indeed, a ſurvey

* *Waſhington, Juſtice.* Do you deny the right of removing an entry? *Daveiſs.* If it were *res integra*, I ſhould. But the whole landed property of Kentucky would be ſhaken by ſuch a judgment. I admit, therefore, that an entry may be removed; but Maſon, as we contend, has not removed his entry of 8,300 acres.

WILSON v. MASON.

was the ſubſtantial appropriating act; but the laſt clauſe of the land law, p. 98, has altered it in this reſpect.

It is contended alſo, that a ſurvey is better notice than an entry.

When a law only *modifies* certain exiſting rights, it is to be conſidered according to the rules of equity; but when a man claims under a law giving a right *which did not exiſt before*, he muſt bring his caſe ſtrictly within the law. 4 *Bac. ab.* 656, 12 *Mod.* 540, *Birch v. Bellamy. Viner, tit. ſtatute* 506, 507.

Notice was not the only object of the law in preſcribing an entry. The greater object was to avoid confuſion in the ſale of lands, and perplexity in the titles, which would have a bad effect upon the ſale, and to eſtabliſh an uniform mode of appropriating lands and locating warrants. The argument that a ſurvey is better notice than an entry goes to prove that an entry is unneceſſary. The ſurveyor is the agent of the commonwealth with limited powers, which muſt be ſtrictly purſued, or his acts are void. He is by law directed to proceed in a particular manner, and muſt not deviate. A ſpecial power given by ſtatute muſt be ſtrictly purſued, 1 *Bur.* 450, *Rex v. Loxdale.* The ſurveyor muſt purſue the entry, and a ſurvey not correſponding with the entry is void. The ſtatute has made an entry neceſſary. In a ſtatute creating a new law, affirmative words imply a negative. Appropriation means a *legal* appropriation. The book of ſurveys could not be intended to give notice, becauſe it is by law ſhut up for twelve months from every eye but that of the ſurveyor and his employer. The ſurvey itſelf could not be notice, becauſe at any time within three months it is alterable by the party, or by the ſurveyor, and until the end of the three months it does not bind even the party himſelf, or the ſurveyor, and for twelve months afterward it is by law kept ſecret.

The law being affirmative that you ſhall give one kind of notice, implies the negative that no other notice ſhall be ſufficient. The ſurvey in itſelf was wrong, illegal and void. An act in itſelf wrong can never be the foundation of right. Land law, p. 90, and *Talbot v. Seeman*, this day decided.

But in the whole courſe of deciſions in Kentucky a ſurvey has never been conſidered as giving a right. The adjudications for eighteen years do not ſhew the date of a ſurvey to be material as to notice, nor has it ever been ſo conſidered. There has never been a title ſupported upon a ſurvey without an entry ſince the year 1779. To overthrow this courſe of deciſions would ſhake the titles of half the land in Kentucky. Arguments drawn from the inconvenience of unſettling titles to real eſtate have always been reſpected. If it is an error, yet where "it is "eſtabliſhed and has taken root, upon which any rule of "property depends, it ought to be adhered to by the judges, "till the legiſlature think proper to alter it, leſt the new "determination ſhould have a retroſpect, and ſhake many "queſtions already ſettled." 1 *Bl. Rep.* 264, *Robinſon v. Bland.* 2 *Bl. Rep.* 696, *Rice v. Shute.* 1 *P. Williams* 223 *Regina v. Ballivos and Burgenſes de Bewdley. In* 1 *P. Williams*, 399, *Goodright v. Wright.* The court ſaid "*that* "*the altering ſettled rules concerning property is the moſt* "*dangerous way of removing land marks.*" The ſame doctrine is held in 2 *P. Will.* 2 *Dawes v. Ferres*, and in *Wagſtaff v. Wagſtaff*, 2 *P. Will.* 259.

The ſurvey could be no notice to Wilſon becauſe it was alterable, he knew it ought to be altered, and he might well ſuppoſe it *would* be altered. The book of ſurveys is no record, and is not of more authority than the book of entries, which is the only book to be reſorted to, to know what lands have been appropriated.

But if the ſurvey was notice, it was notice only of an illegal act. Notice can not make that lawful which was unlawful in itſelf, nor that unlawful which was in itſelf lawful. 4 *Term Rep.* 639, *Farr v. Newman.*

The court took time till this term to conſider, and now the chief juſtice delivered the following opinion:

Opinion of the Court.

THIS is a writ of error to a judgment of the court of the United States for the diſtrict of Kentucky, rendered on a caveat, and is governed by the land laws of Virginia.

WILSON v. MASON.

In the year 1779 the legiſlature of that commonwealth opened a land office and offered for ſale, with ſome reſervations, ſo much of that tract of country lying within its boundaries ſouth-eaſt of the river Ohio as was then unappropriated: a part of which now conſtitutes the ſtate of Kentucky.

Every perſon who would pay at the rate of forty pounds for one hundred acres into the treaſury of the ſtate, became entitled to ſuch quantity of waſte and unappropriated land as was, at that rate, equivalent to the money paid, for which a certificate was given to the regiſter of the land office, whoſe duty it was on receipt thereof, to iſſue a warrant for the quantity of land purchaſed, authorizing any ſurveyor, qualified according to law, to lay off and ſurvey the ſame. A warrant might alſo be iſſued on certain other rights.

A chief ſurveyor was appointed for each county, whoſe duty it was to nominate a ſufficient number of deputies for the buſineſs of his county, and the law proceeded to direct that "every perſon, having a land warrant founded "on any of the before mentioned rights, and being de- "ſirous of locating the ſame on any particular waſte and "unappropriated lands, ſhall lodge ſuch warrant with "the chief ſurveyor of the county wherein the ſaid lands "or the greater part of them lie, who ſhall give a receipt "for the ſame if required. The party ſhall direct the "location thereof ſo ſpecially and preciſely as that others "may be enabled with certainty to locate other warrants "on the adjacent reſiduum; which location ſhall bear "date on the day on which it ſhall be made, and ſhall be "entered by the ſurveyor in a book to be kept for that "purpoſe, in which there ſhall be left no blank leaves or "ſpaces between the different entries."

George Maſon was one of the earlieſt purchaſers under this law.

On the 29th of April, 1780, he made the following entries:

"1780, 29th April, George Maſon enters 8,400 acres "of land to begin on Panther creek on the eaſt ſide

" thereof, oppoſite to a beech on the weſt ſide about four " miles above the mouth of the weſt fork, and to run up " and down the ſaid creek and eaſtwardly for quantity."

" 1780, April 29th, George Maſon enters 8,300 acres, " to begin at the upper corner of his 8,400 acre entry, and " to run up the creek on the eaſt ſide and back for quan- " tity."

Panther creek purſues a general weſtwardly courſe from its ſource till it empties into Green river.

The creek forks ſomething more than twelve miles and one quarter of a mile in a ſtraight line above its mouth; and one of thoſe forks, the direction of which towards its ſource is northwardly, has, from the beginning of the year 1780, been generally termed the weſt fork, and the other has been termed Panther creek.

On the 27th of October 1780, Mr. Maſon made the following entry with the ſame ſurveyor:

" 1780, October the 27th, George Maſon deſires to " make his entry of 8,400 acres, more ſpecial on Panther " creek, viz. to begin four miles above the forks of Panther " creek where it mouths into Green river on the eaſt ſide " running up and back for quantity."

In the months of September and October, 1783, theſe two entries of 8,400 and 8,300 acres were ſurveyed by James Hord, one of the deputy ſurveyors of the county of Jefferſon, which ſurveys, as was the cuſtom, were made conformably to the inſtructions given by Mr. Maſon's agent.

The ſurvey of the entry of 8,400 acres is ſuppoſed to conform to the explanation or amendment of that entry made in October, 1780. It begins four miles above the mouth of Panther creek and ſomething more than eight miles below its forks.

The ſurvey of the 8,300 acre entry adjoins the ſurvey of 8,400 acres on the upper ſide; and the plat was ſhown by the ſurveyor before he would return it to the then agent.

WILSON v. MASON.

of Mr. Maſon, who, after its ſuppoſed variance from the entry was ſuggeſted to him, approved it and directed it to be returned to the office.

Theſe ſurveys were returned in the courſe of the fall, 1783.

The ſuppoſed variance between the ſurvey and location of the 8,300 acres was afterwards, about the 12th of September, 1784, pointed out by the ſurveyor to a ſubſequent agent of Mr. Maſon, who alſo approved of the manner in which the ſurveys were made, and returned them to the land office.

On the 9th of April, 1783, George Wilſon enters with the ſurveyor of Jefferſon county 40,926 acres of land on Panther creek, ſo as entirely to include George Maſon's ſurvey of 8,300 acres.

This entry, though in the name of George Wilſon, was made by John Handley, a deputy ſurveyor for Jefferſon county, for his own benefit and that of Chriſtopher Greenup, as well as for the benefit of George Wilſon, and at the time of making the entry, full knowledge of the previous ſurvey made of the ſame land for George Maſon, had been obtained by the ſaid Handley, who had ſeen the ſurveys in the office and had communicated this information to his two partners in the entry.

In the month of March, 1784, George Wilſon entered in the ſupreme court of the diſtrict of Kentucky a caveat to prevent a grant from iſſuing on George Maſon's ſurvey of 8,300 acres, becauſe the ſurvey was made contrary to location, and becauſe the entry was vague, he claiming the ſame, or ſo much thereof as interferes with his entry made on treaſury warrants for 40,926 acres on the 9th of April, 1784.

Pending the caveat George Maſon departed this life, and the ſuit was revived againſt Richard Maſon, deviſee of the ſaid George, at whoſe petition it was removed into the court of the United States, held for the diſtrict of Kentucky.

A croſs caveat was entered in the ſame court on the part of Richard Maſon, to prevent the iſſuing a patent to George Wilſon, and theſe cauſes coming on to be heard, it was agreed that the judgment rendered in the caveat Wilſon v. Maſon, ſhould be alſo entered in the caſe of Maſon v. Wilſon.

In June term 1800, the opinion of the court for the diſtrict of Kentucky was given that the defendant Maſon had the better right, and it was ordered that the caveat entered by Wilſon ſhould be diſmiſſed.

To this judgment the plaintiff Wilſon has obtained a writ of error, and the principal queſtion now to be decided by this court is, which of the parties has the better right?

But before entering on the queſtion it may be neceſſary to notice a preliminary point made by the counſel for the defendant in error. He contends that in a caveat the deciſion of the diſtrict court is final, and that the cauſe cannot be carried before a ſuperior tribunal.

To maintain this propoſition he relies on an act of the legiſlature of Virginia, making the judgments of the diſtrict courts of the ſtate final in caſes of caveat; and on the compact between Virginia and Kentucky, which ſtipulates that rights acquired under the commonwealth of Virginia ſhall be decided according to the then exiſting laws.

This argument would not appear to be well founded had Virginia and Kentucky even been for every purpoſe independent nations; becauſe the compact muſt be conſidered as providing for the preſervation of titles, not of the tribunals which ſhould decide on thoſe titles. But when their ſituation in regard to the United States is contemplated, the court cannot perceive how a doubt could have exiſted reſpecting this point. The conſtitution of the United States, to which the parties to this compact had aſſented, gave juriſdiction to the federal courts in controverſies between citizens of different ſtates. The ſame conſtitution veſted in this court an appellate juriſdiction in all caſes where original juriſdiction was given to the

WILSON v. MASON.

inferior courts, with only "such exceptions and under "such regulations as the congreſs ſhall make." Congreſs, in purſuance to the conſtitution, has paſſed a law on the ſubject, in which the appellate juriſdiction of this court is deſcribed in general terms ſo as to comprehend this caſe, nor is there in that law any exception or regulation which would exclude the caſe of a caveat from its general proviſions. If then the compact between Virginia and Kentucky was even ſuſceptible of the conſtruction contended for, that conſtruction could only be maintained on the principle that the legiſlatures of any two ſtates might, by agreement between themſelves, annul the conſtitution of the United States.

The juriſdiction of the court being perfectly clear, it remains to enquire which of the parties has the better right.

The title of Maſon being eldeſt is of courſe the beſt if it be not in itſelf defective.

In the caveat of the plaintiff in error two defects in the title of the defendant are aſſigned.

1ſt. That his entry is vague.

2dly. That he has ſurveyed contrary to his location.

The firſt was abandoned in argument, and does not appear to the court to have been maintainable.

The ſecond ſhall now be conſidered.

To ſupport the allegation that the ſurvey has been made contary to the location, the entry and the ſurvey are produced.

The entry calls for a beginning on the upper corner of George Maſon's entry of 8,400 acres. To aſcertain this ſpot reference muſt be had to the entry called for. That is to begin on Panther creek, on the eaſt ſide thereof, oppoſite to a beech on the weſt ſide, about four miles above the mouth of the weſt fork, and to run up and down the ſaid creek and eaſtwardly for quantity.

The branch of Panther creek which was at the date of the entry generally denominated the weſt fork, is ſomething more than twelve miles and one quarter of a mile above its mouth. The entry of 8,400 acres is to begin four miles above the weſt fork, and the land in controverſy ought to be placed above that entry. Yet it is ſurveyed below the weſt fork.

To obviate this difficulty the counſel for the defendant in error produces and relies upon the entry of October 27th, 1780.

That entry is in theſe words:

"George Maſon deſires to make his entry of 8,400 acres more ſpecial on Panther creek, viz. to begin four miles above the forks of Panther creek, where it mouths into Green river, on the eaſt ſide, running up and back for quantity."

This entry is contended to be, not a removal, but an explanation of that which had been made on the 29th of April, 1780, and being merely an explanation, the ſurvey of the land in controverſy, beginning at the upper corner of the ſurvey of the 8,400 acre tract, conforms to its original location, and is conſequently free from the exception made to it.

If this poſition be true, the entry of the 27th of October, 1780, muſt deſcribe the ſame land with that which is deſcribed, though with leſs certainty, by the entry of the 29th of April in the ſame year.

But the entry of the 29th of April, calls for a beginning four miles above the mouth of the weſt fork of Panther creek, which fork is more then twelve miles in a ſtraight line above the mouth of the creek, and the ſubſequent entry begins four miles above the forks of Panther creek where it mouths into Green river. The weſt fork of Panther creek and the mouth of the ſame creek where it empties into the river are perfectly diſtinct and ſeparate places and were ſo underſtood at the time this location was made.

WILSON v. MASON.

It is however contended that in the extenſive wilderneſs offered for ſale, accuracy of deſcription was not to be expected, and the point of union between a creek and river might well be miſtaken for the forks of a creek.

This would not be very probable in any caſe, but is totally inadmiſſible in this, becauſe names of places which they were generally underſtood to poſſeſs have been uſed by the perſon locating for Mr. Maſon, and as there are no other controlling boundaries referred to, they muſt be underſtood as deſignating the water courſes which were commonly deſcribed by thoſe names, and which any perſon inclined to locate the adjacent reſiduum, would neceſſarily ſuppoſe to have been referred to by them.

But if the location of October explains without removing that of April, then the original entry might without ſuch explanation, have been there ſurveyed, and could not have been properly ſurveyed four miles above the weſt fork.

This would ſcarcely have been attempted.

Indeed the counſel for the appellee, in admitting that an entry made on the land in controverſy, ſubſequent to Maſon's entry, but before his ſurvey, would have been good, ſeems to have diſcloſed an opinion that the original entry did not comprehend the land in queſtion, and that not the entry, but the ſurvey is to be relied on as the foundation of his title.

To the court it appears perfectly clear, that the entry of the 27th of October was a removal and not an explanation, of that of the 29th of April.

It has not been contended that the removal of the 8,400 acre entry has alſo removed that of 8,300 acres.

The title of Maſon then if good, muſt be ſhewn to be ſo by eſtabliſhing that a ſurvey without an entry is a ſufficient foundation for a title.

With a view to diſcover whether this queſtion has been ſettled in Kentucky all the adjudications contained in the

book of reports furniſhed by the counſel for the plaintiff in error, have been examined. It is not perceived either that the queſtion has been directly determined, or that any principles have been ſettled which govern it.

This caſe then is of the firſt impreſſion.

The act of the Virginia legiſlature muſt be expounded according to the opinion this court may entertain of its import, without deriving any aid from the deciſions of the ſtate tribunals.

In 1779, Virginia opened a land office for the ſale of an extenſive unſettled and almoſt unexplored country, the motives for which are ſtated in the preamble of the ſtatute to have been, "to encourage the migration of foreigners, promote population, increaſe the annual revenue, and create a fund for diſcharging the public debt."

Any perſon whatever might become a purchaſer of any portion of theſe lands by paying into the treaſury of the commonwealth the purchaſe money required by law. By doing ſo he became intitled to a warrant authorizing any ſurveyor to lay off for him in one or more ſurveys the quantity of land purchaſed. It was apparently contemplated by the law that the number of purchaſers would immediately become very conſiderable. The condition of theſe purchaſers in this ſtage of the contract ought to be diſtinctly underſtood. They had acquired a right each to appropriate to himſelf ſo much of the vacant land belonging to the commonwealth as he had purchaſed, but no right either in common or ſeverally, to the whole or any particular part of the country, until ſuch right ſhould be acquired by further meaſures.

This was at the ſame time the ſituation of a great number of perſons, and a prior was in no reſpect more eligibly circumſtanced than a ſubſequent purchaſer, except in the ſingle caſe of both applying preciſely at the ſame time, for the purpoſe of appropriating each to himſelf the ſame land. Had the purchaſer of the firſt warrant been negligent enough to hold it up until the whole land was appropriated, the title of every ſubſequent purchaſer would have been good againſt him, and he would have been

WILSON v. MASON.

without remedy. The original purchaſe of a warrant then creating only a general claim which gave of itſelf only in a ſingle caſe priority of right to the prior purchaſer, it became indiſpenſably neceſſary to preſcribe a mode by which this general title ſhould be ſatisfied by the appropriation of a particu ar tract of land.

This mode ſeems to have been preſcribed by that part of the act which ſays that "every perſon having a land "warrant and being deſirous of locating the ſame on any "particular waſte and unappropriated lands, *ſhall* lodge "ſuch warrant with the ſurveyor of the country wherein "the lands or the greater part of them lie." "The party "ſhall direct the location thereof ſo ſpecially and pre-"ciſely that others may be enabled *with certainty*, to lo-"cate other warrants on the adjacent reſiduum; which "location ſhall bear date the day on which it ſhall be "made, and ſhall be entered by the ſurveyor in a book "to be kept for that purpoſe."

This mode of appropriation pointed out by the law as that which muſt be uſed by any perſon deſirous of locating a warrant on any particular waſte and unappropriated land, requires that the location ſhall be given to the ſurveyor with the warrant, in order to be entered in a book kept for that purpoſe, which is denominated the book of entries.

It is apparent throughout the whole act that the legiſlature never contemplated a ſurvey as being in itſelf an appropriation of land, or ſuppoſed that one would be ever made, if not founded on a previous entry.

Some few of the many paſſages which are found in various parts of the law will be ſelected to evince this poſition.

The ſurveyor is forbidden to admit the entry of any warrant on treaſury rights, except pre-emption warrants, in his books before the firſt day of May next ſucceeding the paſſage of the act. But the prohibition does not extend to a ſurvey, and yet this would have been equally neceſſary if land could have been appropriated by a ſurvey without a previous location.

It is declared that no entry or location ſhall be admitted for certain lands which are deſcribed in the act and intended to be reſerved: But there is no declaration that they ſhall not be ſurveyed. This omiſſion manifeſts an opinion that they could not be appropriated by ſurvey alone.

In preſcribing the duty of a ſurveyor the law enjoins him to proceed with all practicable diſpatch to ſurvey all lands entered in his office; and many rules are given to regulate the ſuveying of entries; but there is not a ſyllable in the act which contemplates or makes a ſingle proviſion for ſurveys not founded on a prior entry made in the book of entries.

The mode of appropriation then which the law deſignates has not been purſued, but it is contended that another courſe has been adopted which equally produces all the objects deſigned to be effected by the location in the book of entries, and which therefore ought to be received as a ſufficient ſubſtitute for an entry.

The legiſlature of Virginia, when bringing her lands into the market, had undoubtedly a right to preſcribe the terms on which ſhe would ſell, and the mode to be purſued by purchaſers for the purpoſe of particulariſing the general title acquired by obtaining a land warrant. The court is by no means ſatisfied of its power to ſubſtitute any equivalent act for that required by the law.

The caſe of Blackwell v. Harper, reported in 2. Atkyns, 93, has been cited to ſhow the authority of a court to diſpenſe with part of a ſtatute directing the mode of proceeding to be obſerved by a perſon who claims title under ſuch ſtatute.

That caſe aroſe under an act of parliament which directs that "any perſon who ſhall invent, or deſign, engrave, &c. any hiſtorical or other print or prints, ſhall have the ſole right and liberty of printing and re-printing the ſame for the term of fourteen years, to commence from the day of the firſt publiſhing thereof, which ſhall be truly engraved with the name of the proprietor on each plate, and printed on every ſuch print or prints."

WILSON v. MASON.

The plaintiff had engraved certain medicinal plants, a work deemed within the act, and had brought a bill to eſtabliſh her right to the ſole property in them, and to reſtrain the defendant from copying and engraving them, upon the penalties within the act of parliament.

It was objected that the day of publication from which the term was to commence had not been engraved, and ſo the act had not been complied with and conſequently the property had not veſted.

Lord Hardwicke was of opinion that the property veſted, although the day of publication was not engraved, and that the words directing the day of publication to be engraved on each print were only neceſſary to make the penalties incur, not to give the title.

"Here," ſaid his lordſhip, "the clauſe which veſts the property is diſtinct."

This opinion however was given with great doubt, and only an injunction was granted without coſts and without an order for an account.

The caſe of Blackwell v. Harper has, at the bar, been denied to be law. However this may be, it is certainly eſſentially variant from that before the court.

The opinion of lord Hardwicke was not that where any circumſtance was required by a ſtatute in order to veſt a title, other equivalent acts might be received as a ſubſtitute; but that the particular ſtatute on which the caſe depended, did not require the omitted circumſtance, ſince the property was veſted by a diſtinct clauſe.

By a reference to the words themſelves, it will be perceived that the expreſſion of the act of parliament is ſuch as might perhaps warrant this opinion. The property is completely veſted before the direction concerning the date of the publication is given, and lord Hardwicke ſuppoſes it to be aqueſtion on which judges would differ whether the ſubſequent words were merely directory or deſcriptive. A perfect property in the ſpecific thing was ſuppoſed by that judge to have been given by other words, and on that idea his decree is declared to have been formed.

But in the case under consideration no property in the specific thing is supposed to have been given by other words. No title to it is created by any other part of the act. The purchase of the land warrant gave a power to appropriate, but was no appropriation, and the mode pointed out by the legislature would seem to the court to be that, which can alone give title to the particular lands.

But if this opinion should even be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act, nor does it seem to have been so considered by the legislature.

From the circumstances under which the act for establishing the land office was passed, as well as from the expressions of that act, it is apparent that the entry was intended to give complete notice to other purchasers that the land located was already appropriated. The mode of giving this notice it was certainly proper to prescribe. By doing so, the numerous doubts and questions concerning the sufficiency of notice, which would inevitably arise from leaving that important fact to the discretion of individuals, in the first instance, and then to the discretion of courts to be exercised many years after all the lands should be located, would be in a considerable degree obviated.

It was doubtless an important object to obviate them.

The regulations therefore respecting entries are all calculated to make them as notorious as possible.—Not so of surveys.

The entries and surveys are to be kept in separate books. Why so if a survey amounted to an entry?

The entry must be dated when made by the locator; but the time of recording a survey may appear or not at the discretion of the surveyor, and a subsequent survey may be recorded before one of prior date.

There are to be no blanks in the book of entries, and this regulation is well calculated for the prevention of

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WILSON v. MASON.

frauds in the origin of titles. It does not apply to the book of ſurveys.

The book of entries is open to the inſpection of every perſon. The book of ſurveys cannot be looked into but at the diſcretion of the ſurveyor.

If a prior entry be alleged the perſon affected thereby has a right to demand a copy thereof; but no copy of a ſurvey can be given to any other than the proprietor until twelve months after it ſhall have been made.

From the whole act a legiſlative intention to make an entry, and an entry only, the foundation of title to any particular tract of land is ſtrongly to be inferred, and if even an equivalent act could be received, a ſurvey does not appear to be ſuch an act. In this particular caſe it is true that complete notice was obtained by it, but titles muſt reſt on general principles, and in the general, a ſurvey would not, without ſomething more than the law requires, be notice. The law, therefore, can not contemplate a ſurvey as of equal operation with an entry.

A queſtion has been made at the bar, whether a caveat is in the nature of an equitable action, and on the ſuppoſition that it is of that nature, the counſel for the defendant in error has inſiſted that Wilſon, having expreſs notice of Maſon's ſurvey, was unable to acquire title to the land appropriated by that ſurvey.

This would be true if the ſurvey gave to Maſon any title either in law or equity. But if a ſurvey without an entry was no appropriation—if it gave no title—then notice of the ſurvey could not create a title.

The doctrine of notice is well eſtabliſhed. He who acquires a legal title, having notice of the prior equity of another, becomes a truſtee for that other to the extent of his equity. But if he has no equity, then there is nothing for which the purchaſer of the legal eſtate can be a truſtee.

A point in the caſe ſtill remains which appears more doubtful, and concerning which very conſiderable difficulties have been felt.

Although Maſon's ſurvey may give him no title, it is queſtioned whether Wilſon can maintain a caveat againſt it.

The caveat is a remedy given to prevent a patent from iſſuing in certain caſes where the directions of the law have been violated to the injury of the commonwealth, or where ſome other perſon hath a better right. The caſe before the court is that of a better right. The terms in which this remedy is accorded to the perſon who would avail himſelf of it for the purpoſe of aſſerting his own title are, "or if any perſon ſhall obtain a ſurvey of lands "to which another hath by law a better right, the perſon "having ſuch better right may in like manner enter a ca-"veat," &c.

Conſiderable doubts were entertained whether the word "*hath*," in the deſcription of the character by whom a caveat might be maintained, did not abſolutely require that the better right ſhould exiſt at the time the ſurvey ſhould be obtained. This conſtruction, to which ſome of the court were at firſt greatly inclined, would have involved conſiderable inconvenience, and would have defeated what is deemed the eſſential object for which the remedy was given.

It has been already ſtated to be the opinion of the court, that a ſurvey not founded on an entry is a void act and conſtitutes no title whatever. Conſequently the land ſo ſurveyed remains vacant and liable to be appropriated by any perſon holding a land warrant. It is difficult to conceive that a remedy deſigned to enable an individual who has made his entry in conformity with the law, to prevent another from obtaining a grant for the land he has entered, ſhould be withheld from any perſon whoſe entry entitles him to the land he has located. It is not leſs difficult to impute to the legiſlature an intention to protect a ſurvey to which the law denies all power of appropriating the land it comprehends, or an intention of carrying ſuch ſurvey into grant, while another has legally appropriated to himſelf the land thus to be granted. It would be difficult to ſtate a caſe to which the principle, that a remedy ſhould be ſo extended as to meet the miſchief, would apply more forcibly than to this. If however the

WILSON v. MASON.

terms of the law had been explicit, those terms must have controlled the subject. But the expression of the act is not if any person shall obtain a survey to which another at the time such survey may be obtained shall have by law a better right, the person having such better right may enter a caveat, &c. The words of the law are not thus express. They are, if any person shall obtain a survey of land to which another *hath* by law a better right. The word *hath* in its most strict and rigid sense would refer neither to the time of making the survey, nor or of entering the caveat, but to the present moment when the word is used, and would require that the better right should exist at the time of the passage of the act. This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will. Some latitude of construction then must be used, some words additional to those used by the legislature must be understood, and this being apparent, the court perceive no sufficient motive for extending the remedy to rights existing when the survey shall be made, and denying it to those which are equally valid and which exist when the caveat may be entered.

The caveat entered by Wilson is therefore maintainable under the land law of Virginia, since his title had accrued when it was entered.

The court is of opinion that the district court of Kentucky has erred in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion I am directed to deliver the following judgment.

Judgment of the court.

"Whereupon, it is considered by the court that the plaintiff Wilson hath by law the better right to the land in controversy, and that the judgment of the court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land office in Kentucky do issue a grant to the said Wilson upon his survey of 30,000 acres of land registered in the said office, according to the metes and bounds thereof, and

" that the said plaintiff do also recover his costs expended " in this court and in the said district court, all which " is ordered to be certified to the said district court, and " the said register of the land office accordingly."

WILSON v. MASON.

In the case of Mason v. Wilson, the judgment of the court was, " that the defendant Wilson hath by law the better " right to the land in controversy, and that the judgment " of the court of the United States for the district of " Kentucky be reversed and annulled; and that the said " caveat be dismissed, and that the defendant Wilson reco- " ver his costs, &c."*

UNITED STATES *v.* SCHOONER PEGGY.

U. STATES, v. SCHOONER PEGGY.

A final condemnation in an inferior court of admiralty, where a right of appeal exists and has been claimed, is not a *definitive* condemnation within the meaning of the 4th article of the convention with France, signed Sept. 30, 1800. The court is as much bound as the executive to take notice of a treaty, and will reverse the original decree of condemnation (although it was

ERROR to the circuit court for the district of Connecticut, on a question of prize.

The facts found and stated by judge Law, the district judge, were as follow:

" That the ship Trumbull, duly commissioned by the " President of the United States, with instructions to take " any armed French vessel or vessels sailing under autho- " rity, or pretence of authority from the French republic, " which shall be found within the jurisdictional limits of " the United States, *or elsewhere on the high seas*, &c. as set " forth in said instructions; and said ship did on the 24th " day of April last (April 1800) capture the schooner Peg- " gy, *after running her ashore* a few miles to the westward " of Port au Prince, within the *dominions and territory of* " *General Toussaint*, and has brought her into port as set " forth in the libel, and it further appears that all the facts, " contained in the claim, are true†; whereupon this court

* As to the necessity of giving notice in the form prescribed by law, vide *Evans's Essay on bills*, 67 68. 69 70. 71 —*and* 2 *H. Bl.* 609. *Nicholson v Gouthit.*

† The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint

U. STATES, v. SCHOONER PEGGY.

" are of opinion that as it appears that the ſaid ſchooner " was ſolely upon a trading voyage and ſailed under the " permiſſion of Touſſaint with diſpatches for the French " government, under a convoy furniſhed by Touſſaint, " with directions to touch at Leogane for ſupplies, and " that the arms ſhe had on board muſt be preſumed to be " only for ſelf defence; neither does it appear ſhe had ever " made, or attempted to make, any depredations, and that " ſhe was not ſuch an armed veſſel as was meant and in- " tended by the laws of the United States ſhould be ſub- " ject to capture and condemnation; and that the ſitua- " tion ſhe was in, at the time of capture, being aground " *within the territory and juriſdiction of Touſſaint*, ſhe was " not on the high ſeas, ſo as to be intended to be within " the inſtructions given to the commanders of American " ſhips of war: Therefore, adjudge ſaid ſchooner is not " a lawful prize, and decree that ſaid ſchooner with her " cargo be reſtored to claimant."

correct when made) and decree reſtoration of the property under the treaty made ſince the original condemnation.

Quere. As to the extent of the term *high ſeas?*

From this decree the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge Cuſhing ſat alone, as the diſtrict judge declined ſitting in the cauſe, on account of the intereſt of his ſon who was one of the officers on board the Trumbull, at the time of capture, and who, if the ſchooner ſhould be condemned, would be entitled to a ſhare of the prize money.

The circuit court on the appeal found the following facts, and gave the following opinion and decree:

Touſſaint to receive on board the cargo which was on board at the time of capture; that ſhe had diſpatches from Touſſaint to France; that ſhe ſailed by his authority on the 23d of April, for France, navigated by 10 men, including Buiſſon the claimant, and Gillibert the commander, and having on board 4 ſmall 3 pound carriage guns, ſolely for defence againſt piratical aſſaults, and being under convoy of a tender, furniſhed by Touſſaint. That on the 23d April, ſhe was run aſhore, a few miles to the weſtward of Port au Prince, *within the dominion, juriſdiction, and territory of general Touſſaint, ſo that ſhe was faſt and tight aground*; at which time, and in which ſituation, the boats and crew of the Trumbull attacked and took poſſeſſion of her, and got her off. That Touſſaint then was, and ſtill is, on terms of amity, commerce and friendſhip with the United States, duly entered into and ratified by treaty. That the ſchooner was on a lawful voyage for the ſole purpoſe of trade; and not commiſſioned, or in a condition to annoy or injure the trade or commerce of the United States.

U. STATES v. SCHOONER PEGGY.

"That David Jewitt, commander of the said public armed vessel, called the Trumbull, being duly commissioned, and instructed by the President of the United States, as set forth in the said libel, did on or about the 23d of April last, capture the said schooner Peggy, after running her aground about pistol shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of Saint Domingo, and afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner there were ten persons aboard her. That she was then armed with four carriage guns, being four pounders, with four swivel guns, six muskets, four pistols, four cutlasses, two axes, some boarding hatchets, tommahawks, and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee, sugar, and other merchandize. That she had come from Bourdeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed on or about the said 23d day of April with said schooner and cargo, having dispatches from general Toussaint for the French government. That the said Buisson sailed from Port au Prince as aforesaid with the permission and direction of general Toussaint to proceed to Bourdeaux; that said schooner so sailed from Port au Prince under convoy of an armed vessel by order of said Toussaint without a passport from Mr. Stevens, consul general of the United States at Saint Domingo, but that Buisson had been promised by Toussaint's brother that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bourdeaux for Port au Prince with fifteen men, besides eight passengers (according to the roll of equipage) armed with some guns, swivels and muskets; that said captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self defence. That at the time of said capture, the guns of said schooner were loaded with cannister shot, one of which being fired, the shot fell near the bow of the Trumbull; but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said captain Buisson appeared to be in a disposition, and was prepared with force to resist the boats which were sent from the Trumbull to board him, a lit-

U. STATES v. SCHOONER PEGGY.

" tle previous to the capture, in case of their attempting " it; and that the said schooner and cargo are French " property.

" Upon these facts the court is of opinion as follows, " viz.

" However compassion may be moved in favour of " the claimant by some circumstances; such as that he " was charged with dispatches from general Toussaint, " between whom and the United States there were " some friendly arrangements respecting commerce; that " he was not in a capacity of greatly annoying trade, " from the fewness of his men; and his allegation that " he was armed only in defence; yet as the court is bound " by law, which makes no such distinctions; as armed " French vessels are not protected by any treaty or con- " vention; particularly not by the regulations between " general Toussaint and the American consul; and as the " said schooner Peggy was in a condition capable of an- " noying, and even of capturing single, unarmed trading " vessels, unattended with convoy; The court cannot " avoid being of opinion, that she falls within the de- " scription, and general design, of the expression of the " law, an armed French vessel.

2dly. That she was captured on the high seas: the ar- " gument taken by the claimants counsel, from the extent " of national jurisdiction on sea coasts bordering on " the country, not applying to this case so as to ac- " quit the said schooner; the sea coast of Saint Domingo, " not being neutral; not made so by any treaty or con- " vention; but to be considered as hostile, upon our pre- " sent plan of laws of defence with respect to France; " as much so as any part of the coast of France, as far as " regards *French armed vessels.*

" The court is therefore of opinion that the said " schooner Peggy and cargo are lawful prize:

" It is therefore considered, decreed and adjudged by " this court, that the decree of the district court respect- " ing the same, as far as regards their acquittal, be, and " the same is hereby reversed; and that the said schoon-

"er with her apparel, guns and appurtenances, and the "goods and effects which were found on board of her "at the time of capture, and brought into port as afore-"said, be and the same are hereby condemned as forfeited "to the use of the United States, and of the officers and "men of the said armed vessel called the Trumbull, one "half thereof to the United States, the other half to the "officers and men to be divided according to law; the "said schooner Peggy being of inferior force to the said "armed vessel called the Trumbull."

This sentence and decree were pronounced on the 23d day of September, 1800.

During the present term, and before the court gave judgment upon this writ of error, viz. on the 21st of December, 1801, the convention with France was finally ratified by the President; the fourth article of which convention has these words:

"Property captured, and not yet *definitively* condemn-"ed, or which may be captured before the exchange of "ratificatio is, (contraband goods destined to an enemy's "port excepted) shall be mutually restored." "This ar-"ticle shall take effect from the date of the signature of "the present convention. And if, from the date of the "said signature, any property shall be condemned con-"trary to the intent of the said convention, before the "knowledge of this stipulation shall be obtained; the "property so condemned shall without delay be restored "or paid for."

On the 30th of September, 1800, this convention was signed by the respective plenipotentiaries of the two nations at Paris. On the 18th of February, 1801, it was ratified by the President of the United States, with the advice and consent of the Senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July, 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

U. STATES v SCHOONER PEGGY.

This proviso being considered by the President as requiring a renewal of the assent of the Senate, he sent it to them for their advice. They returned it with a resolve that they considered the convention as fully ratified.

Whereupon,

On the 21st of December, 1801, it was promulged by a proclamation of the President.

The controversy turned principally upon two points:

1st. Whether the capture could be considered as made on the *high seas*, according to the import of that term as used in the act of congress of July 9th, 1798, vol. 4. p. 163.

2d. Whether, by the sentence of condemnation by the circuit court on the 23d of September, 1800, the schooner Peggy could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris on the 30th of September, 1800.

The writ of error was dated on the 2d of October, 1800.

Griswold and Bayard, for the captors.

Mason, for the claimant.*

The Chief Justice delivered the opinion of the court.

In this case the court is of opinion that the schooner Peggy is within the provisions of the treaty entered into with France and ought to be restored. This vessel is not considered as being definitively condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final in the court which pronounces it, and receives its

* I regret that not having notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

appellation from its determining the power of that particular court over the ſubject to which it applies, or being only an intermediate order ſubject to the future control of the ſame court. The laſt decree of an inferior court is final in relation to the power of that court, but not in relation to the property itſelf, unleſs it be acquieſced under. The terms uſed in the treaty ſeem to apply to the actual condition of the property and to direct a reſtoration of that which is ſtill in controverſy between the parties. On any other conſtruction the word *definitive* would be rendered uſeleſs and inoperative. Veſſels are ſeldom if ever condemned but by a final ſentence. An interlocutary order for a ſale is not a condemnation. A ſtipulation then for the reſtoration of veſſels not yet condemned, would on this conſtruction comprehend as many caſes as a ſtipulation for the reſtoration of ſuch as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controverſy between the parties and the other leaves that controverſy ſtill depending. In this caſe the ſentence of condemnation was appealed from, it might have been reverſed, and therefore was not ſuch a ſentence as in the contemplation of the contracting parties, on a fair and honeſt conſtruction of the contract, was deſignated as a definitive condemnation.

It has been urged that the court can take no notice of the ſtipulation for the reſtoration of property not yet definitively condemned, that the judges can only enquire whether the ſentence was erroneous when delivered, and that if the judgment was correct it cannot be made otherwiſe by any thing ſubſequent to its rendition.

The conſtitution of the United States declares a treaty to be the ſupreme law of the land. Of conſequence its obligation on the courts of the United States muſt be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, ſuperintended by the executive of each nation, and therefore, whatever the deciſion of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unſatisfied, may ſtill be aſſerted.

U. STATES v. SCHOONER PEGGY.

But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

JACOB RESLER *v.* JAMES SHEHEE.

RESLER v. SHEHEE.

After the first term next following an office judgment, in Virginia, it is a matter of

THIS was a writ of error upon a judgment of the circuit court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution brought by Shehee v. Resler, originally in the court of hustings for the town of Alexandria, and transferred by act of

congreſs of 27th February, 1801, concerning the diſtrict of Columbia, to the circuit court of that diſtrict.

RESLER v. SHEHEE.

The declaration ſtated that on the 26th of December, 1799, Reſler, without reaſonable cauſe, procured a certain falſe, ſcandalous, and malicious warrant, to be iſſued againſt Shehee, by F. Peyton, eſq. then mayor of the town of Alexandria, charging Shehee with having received from a certain negro ſlave, called ——— the property of Baldwin Dade, certain ſtolen goods, viz. One box of tallow, knowing the ſame to be ſtolen; which warrant was executed upon the ſaid Shehee, who, by means of the falſe and malicious repreſentations of Reſler, was recognized to appear before the court of huſtings of Alexandria, at April term 1800, to anſwer to the charges contained in the warrant, at which court Shehee was acquitted.

mere diſcretion in the court whether they will admit a ſpecial plea to be filed to ſet aſide that judgment.

At the rules held at the clerk's office, on the 2d February, 1801, an office judgment was entered againſt Reſler for want of a plea, and a writ of enquiry awarded, returnable to the court of huſtings, which by law would have been held on the firſt Monday of April, 1801. But the act of congreſs of 27th February, 1801, which provides for the government of the diſtrict of Columbia, erected a circuit court for the diſtrict, to which it transferred all the cauſes then pending in the court of huſtings; and enacted that the circuit court ſhould hold four ſeſſions a year in Alexandria, viz. On the 2d Mondays of January, April, and July, and the 1ſt Monday of October.

Two terms of the circuit court, viz. April and July, having elapſed without the writ of enquiry being ſet aſide, the defendant Reſler by his counſel, at October term 1801, on the 9th day of the month, appeared and moved the court to ſet aſide the writ of enquiry on filing the following ſpecial plea in juſtification, viz. "And the ſaid de- "fendant by his attorney, George Youngs, comes and "defends the force and inquiry, &c. and for plea ſaith, "that on the 26th day of December, in the year 1799, "at the town of Alexandria aforeſaid, and within the "juriſdiction of the court of huſtings of ſaid town, a "box of tallow, belonging to the defendant, as his own "proper goods and chattels, of the value of two dollars,

RESLER v. SHEHEE.

"was stolen out of the house of the defendant, by some "person unknown to the defendant, and the said defend- "ant being informed by a certain John M'Gill, his jour- "neyman, that the said box of tallow was in the house "of the plaintiff, complained to Francis Peyton, mayor "of the said town, of, and concerning the said box of "tallow, who by his warrant, dated the 27th day of De- "cember, in the year 1799, called the plaintiff before "him and examined him; and upon his examination and "the testimony of sundry persons, bound the plaintiff "to appear at the next grand jury court of hustings of "said town, to answer the charge contained in said war- "rant, of, and concerning the receiving the said box of "tallow, so stolen as aforesaid, and which was found in "his possession, whereupon, the plaintiff appearing was "acquitted and discharged by the said court, which is the "same procurement of the said warrant and acquittal "whereof the aforesaid action is brought, and this the "defendant is ready to verify, &c."

The plaintiff objected to the filing of that plea, in this stage of the cause, and upon argument, the court on the 13th day of October, refused to receive it; whereupon, the defendant took a bill of exceptions, and pleaded the general issue, upon which, on the 14th day of October, there was a verdict for the plaintiff, and judgment for 1000 dollars damages.

On that judgment the defendant brought his writ of error to this court, and the error assigned was the refusal of the court below to suffer the defendant to file the special plea above recited.

The cause was at this term argued by C. Lee for plaintiff in error, and Simms and Mason for defendant.

Lee. This case depends upon the law and practice of Virginia. By the *act of congress of 3d March*, 1801, supplementary to the act concerning the district of Columbia, sec. 3, it is enacted, "that the circuit court for "the county of Alexandria, shall possess and exercise "the same powers and jurisdiction, civil and criminal, "as is now possessed and exercised by the district courts "of Virginia."

The act of assembly of Virginia, respecting the district courts of that state, sec. 28, *(revised code, p. 85.)* provides, that "every judgment entered in the office against "a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put "in good bail, being ruled so to do, or surrender himself "in custody, and shall plead to issue immediately." And in sec. 42, of the same act, p. 87, it is further provided, "That all judgments by default for want of an appearance or special bail, or pleas as aforesaid, and non-suits "or dismissions obtained in the office, and not set aside "on some day of the next succeeding district court, shall "be entered by the clerk as of the last day of the term; "which judgment shall be final in actions of debt founded on any specialty, bill, or note in writing, ascertaining the demand, unless the plaintiff shall choose "in any such case to have a writ of enquiry of damages; "and in all other cases the damages shall be ascertained "by a jury, to be empanneled and sworn to enquire "thereof, as is herein after directed."

Upon an equitable construction of these sections of the act, the practice in Virginia has been to permit the defendant to come in at a subsequent term and avail himself of any such defence as he has, in the same manner as if he had pleaded it at the particular term mentioned. This question has been discussed in Virginia and received the construction for which I contend. The case of *Downman v. Downman's executors*, 1. *Wash.* 26, was a plea of tender after office judgment confirmed. *In p.* 27, the "court say, these words "*plead to issue immediately*," are "the same as were used in the old act of 1753, for establishing the general court; under which, the practice "of that court was very liberal, in allowing a defendant "to plead that which did not make an issue, but required "subsequent pleadings, provided the real justice of the "case, and not intended delay, was thereby promoted. "This is unavoidable in cases of bonds with collateral "conditions, where the defendant cannot plead to issue. "This is also agreeable to the principle laid down by lord "Holt, in 2. *Salk.* 622; "That though a judgment be "ever so regularly entered, it shall be set aside at any "time on payment of costs, so as the plaintiff does not

RESLER v. SHEHEE.

"loſe a trial." And again in p. 28, "conſidering the cir-
"cumſtances of this country and the diſperſed ſituation
"of the attornies and their clients, who can ſeldom com-
"municate with each other but at court, juſtice ſeems to
"require a relaxation in theſe rules (Engliſh rules) of
"practice. It would ſeem to me proper to allow a diſ-
"cretion in the judges to admit any plea which appears
"neceſſary for the defendant's defence, and only to re-
"ſort to the rigor of the rule where delay appears to be
"intended." This plea then, if neceſſary for the defend-
ant's defence, ought to have been admitted. It contains
nothing exceptionable, and the facts ſtated in it, if true,
are a juſtification. There is no caſe more proper for
ſpecial pleading than one in which the prejudices of the
people are enliſted on one ſide or the other. The law
only directs what is to be done the firſt term, but after-
wards it is left open to the diſcretion of the court. In
this caſe there can be no pretence that the plea was in-
tended for delay, as it was offered on the 9th, and the
cauſe was not tried until the 14th of October, ſo that
there was full time to anſwer the plea and make up the
iſſue.

To ſhew that this plea is a good juſtification, I refer to the caſe of *Coxe v. Wirrall*, *Cro. Jac.* 193, where a ſimilar plea was adjudged good upon demurrer.

It is common practice, even in the Engliſh courts, to permit the general iſſue to be withdrawn, and a ſpecial plea filed, where it is not done with an intent of delay. *Jefferys v. Walter*, 1 *Wilſon*, 177—*and* 254, *Taylor v. Joddrell*. But the caſe of *Downman v. Downman*, before cited, ſeems concluſive upon this queſtion.

Chaſe, Juſtice. Have the rules of the Virginia courts been adopted in the circuit court?

Lee. I conceive the circuit court at Alexandria, to be in the ſame ſituation as the diſtrict court at Richmond. And, as I underſtand the act of congreſs, they are obliged to adopt the practice of the courts of Virginia, except where the circuit court has actually made a different rule.

Simms, for defendant in error.

RESLER v. SHEHER.

I will not deny that the courts of Virginia have gone the length ſtated in Waſhington's reports. They have uſed their diſcretion, and have conſidered whether the plea offered tends to the juſtice of the cauſe, or whether it is intended only for delay. In this caſe, the time having paſſed when the defendant could file his plea as a matter of right, it was entirely in the diſcretion of the court to admit or reject it.

It is certainly not a ſufficient juſtification for the defendant to ſay that the magiſtrate committed the plaintiff; for that neither deſtroys the evidence of expreſs malice, nor ſhews probable cauſe for the proſecution. The magiſtrate might have committed upon the evidence of the defendant Reſler himſelf; ſo that this plea would moſt probably have been over-ruled upon demurrer, and at any rate would have created delay; for in a matter of ſo much conſequence it cannot be preſumed that the counſel for the plaintiff could at once determine whether to demur or to join iſſue.

The defendant was not precluded from making a proper defence. He might have ſhewn probable cauſe on the general iſſue, for the giſt of the action is the want of probable cauſe; and the court had the power of inſtructing the jury whether ſuch cauſe was ſhewn or not. *Buller, N. P.* 14.

It is ſaid that the plea was offered in a reaſonable time. It can not ſurely be ſaid that three days in the hurry of the court is a reaſonable time to anſwer ſuch a plea—ſo ſay the courts of Virginia.

This plea amounts to the general iſſue, and therefore ought not to have been received. The juſtice of the caſe did not require it, and it is only to promote juſtice that the courts have ever deviated from the preciſe terms of the law.

Maſon, on the ſame ſide.

Admitting for a moment that the practice of the Virginia courts was binding upon the circuit court, yet the

RESLER v. SHEHEE.

court have only exerciſed the ſame diſcretion which a Virginia court might have exerciſed. There is a particular time allowed for ſpecial pleading; after that time, the admiſſion of a plea is diſcretionary with the court. The caſe in Waſhington's reports is clear to ſhew that it is altogether a matter of diſcretion. The court might have refuſed to receive any plea at all; for the right of the defendant to ſet aſide the office judgment, by pleading to iſſue, is confined to the court next ſucceeding the office judgment.

But the defendant had every advantage under the general iſſue, which he could have had under his plea. It is extremely clear that the plaintiff muſt ſhew malice, and the defendant, matter of juſtification. The rules of practice in the courts of Virginia, are confined to Virginia. The courts of the United States are not bound by them. They have power to make their own rules.

Lee, in reply.

Our complaint is that the inferior court has not exerciſed its diſcretion in the manner it ought to do. I uſe the word *diſcretion*, differently from Mr. Maſon. The exerciſe of ſuch diſcretion is ſubject to the control of this court. If we look to the deciſions of the courts in Virginia, we find that they have ſoundly exerciſed their diſcretionary power. The practice has conſtantly been to let in the parties notwithſtanding any laches. Was it proper in the court to ſay, that although we have a right to ſuffer you to bring the queſtion of probable cauſe before the court, and to take it from the jury, and although you wiſh ſo to do, yet we will not permit you, but will compel you to go before the jury; where facts diſcloſed, not pertinent to the iſſue, might make an improper impreſſion?

Cuſhing, Juſtice. Do you admit that the defendant might have given in evidence under the general iſſue, the facts ſtated in the plea offered?

Lee. It is ſufficient for us if it was a matter of doubt. In ſuch a caſe, a cautious practitioner will always take the ſafeſt method, and plead the facts ſpecially.

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There is no doubt but the court had a right to make rules of practice for itſelf. But not having made ſuch a rule in this caſe, its diſcretion ought to have been guided by the practice of the Virginia courts. We therefore hope that this court will correct the indiſcreet exerciſe of the power of the court below in this caſe. RESLER v. SHEHER.

The Court. It is true that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office judgment, which was neceſſary to bring forward the ſubſtantial merits of the caſe, whether it was ſtrictly an iſſuable plea, or not. But at a ſubſequent term, it is a matter of mere diſcretion with the court whether they will admit any ſpecial plea at all.

In the preſent caſe the facts, ſtated in the plea offered, might have been given in evidence on the general iſſue; the court exerciſed their diſcretion ſoundly in rejecting the plea.

Judgment affirmed.

TURNER v. FENDALL.

THIS was a writ of error to reverſe a judgment of the circuit court of the diſtrict of Columbia ſitting at Alexandria, rendered on a motion by Fendall againſt Turner, late ſergeant of the corporate town of Alexandria, for the amount of money received by him on a fieri facias iſſued on a judgment in favour of Fendall againſt one Towers. TURNER v. FENDALL.

A ſheriff makes the money upon a fi fa at the ſuit of A. vs. B and afterwards a fi fa. againſt A is put into his hands, he cannot levy it upon the money of A. made by the fi fa. of A. v. B for it does not become the goods and chattels of A. until

This motion was grounded on an act of aſſembly of Virginia, reviſed code page 317. §. 51.—by which it is enacted that "If any ſheriff, under ſheriff, or other offi- "cer, ſhall make return upon any writ of *fieri facias* or "*venditioni exponas*, that he hath levied the debt, dama- "ges or coſts, as in ſuch writ is required, or any part "thereof, and ſhall not immediately pay the ſame to "the party, to whom the ſame is payable, or his attor- "ney," "it ſhall and may be lawful for the creditor at

TURNER v. FENDALL.

it is paid over to him; and by the command of the writ the sheriff is in strictness bound to bring the money into court, there to be paid to the plaintiff

On a motion, in Virginia, against a sheriff, for not paying over monies by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the term next succeeding that to which the execution has been returned.

Proceedings before magistrates in cases of insolvent debtors are matters *in pais*, and may be proved by parol testimony.

It is not error in the court below to reject, as incompetent, admissible testimony tending to prove a fact not relevant to the case before the court

Money *may* be taken in exe-

"whose suit such writ of *fieri facias*, &c. shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer, or under sheriff, or securities of such under sheriff, for the money or tobacco mentioned in such writ, or so much thereof as shall be returned levied on such writs of *fieri facias*, &c. with interest thereon at the rate of 15 *per centum per annum*, from the return day of the execution, until the judgment shall be discharged; and *such* court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided such sheriff or officer have ten days previous notice of such motion."

Fendall had recovered judgment against Towers, in the court of hustings in the town of Alexandria, for 627 dollars and 52 cents damages, and 4 dollars and 91 cents costs, on which judgment a *fieri facias* issued, directed to the sergeant of the court of hustings, dated the 13th of December 1800, returnable to the said court of hustings on the first Monday of February then next. Upon this writ was the following return, viz. "Sergeant returns, executed on one large copper boiler and sundry casks, and sold for the sum of 703 dollars and 98 cents, including sergeant's commissions, *on which money I have levied a writ of fieri facias, issued from the clerk's office of the court of Fairfax county, on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall*, merchants, trading under the firm of Robert Young and company.

Charles Turner, T. S."

Before the next succeeding term of the court of hustings, after the return of the execution, the act of congress of 27th of February 1801, concerning the district of Columbia, intervened, by which the laws of Virginia, as they then existed, were declared to be and continue in force in that part of the district of Columbia which was ceded by that state to the United States, and by them accepted for the permanent seat of government; and all suits, process, &c. depending in the court of hustings for the town of Alexandria, were transferred to the circuit court of the district of Columbia established by that

act; and the first session of the circuit court in Alexandria was by law held on the second Monday of April, 1801.

TURNER v. FENDALL.

To that term, April 1801, Fendall gave Turner notice, in the usual form, that on the first day of the court he should move for judgment against him for the amount of the execution with interest thereon according to law; which notice was signed, "Philip Richard Fendall, *for* "*the trustees of Philip Richard Fendall*," and was duly served. Turner not having appeared the motion was continued till the next term, July 1801, when he appeared and admitted the regularity of the delivery and continuance of the notice—and the court upon argument gave judgment for the plaintiff Fendall; to reverse which judgment, Turner sued out the present writ of error.

cution *if in the possession of the defendant.*

The record which came up contained three bills of exceptions.

The first stated that the defendant Turner, to prove that Fendall had taken the oath of an insolvent debtor, and was thereupon discharged out of custody, produced the following writing, viz. "Fairfax, Sct. Whereas Philip "Richard Fendall, a prisoner confined in the gaol of Fair- "fax county, under execution at the suit of Samuel Love, "issued from the district court of Dumfries, and it ap- "pearing that legal notice had been given, and a warrant "issued, for bringing before us, for the purpose of taking "the oath of an insolvent debtor, and the said Philip "Richard Fendall having this day, in the court house of "the said county, delivered in a schedule of his estate and "effects and taken the oath prescribed by law; These are "therefore in the name of the commonwealth to command "you to discharge the said Philip Richard Fendall out "of your gaol and custody, and, for so doing, this shall "be your sufficient warrant. Given under our hands and "seals this twenty-first day of March, eighteen hundred.

"WILLIAM HERBERT, Seal,
"R. WEST, Seal.

"To the sheriff or keeper of the gaol of Fairfax County;" and offered to prove the hand writing of the said William Herbert and Roger West; and also to prove by oral testimony that the said Philip Richard Fendall did take the

TURNER v. FENDALL.

oath of an insolvent debtor before the said William Herbert and Roger West, whose names are subscribed to the said writing, and also to prove by oral testimony that the said William Herbert and Roger West were magistrates of the county of Fairfax, on the 21st of March 1800, and had acted as such for many years before; but the court gave it as their opinion that the said writing and oral testimony were not legal evidence to be admitted to prove the above mentioned facts.

The 2d bill of exceptions stated, that the defendant Turner offered to shew to the court that the trustees of Fendall were not entitled to the money levied on the execution of Fendall *v.* Towers, but the court refused to suffer him to go into that enquiry.

The 3d bill of exceptions stated, that the defendant Turner produced a copy of an execution issued on a judgment obtained by William Deneale against Robert Young and Philip Richard Fendall (the plaintiff in the motion below) and a copy of the return, which return was in these words, "Executed on the sum of 682 dollars and "43 cents, money in my hands, being the amount of the "sum received by me for the sale of certain property ta-"ken by virtue of a *fieri facias*, issued from the clerk's office "of the court of hustings of Alexandria, on a judgment "obtained by the within named Philip R. Fendall against "John Towers.

"CHARLES TURNER, T. S."

and alledged that he had a right, and was bound, to levy that execution on the money of the said Fendall, which he had levied by virtue of the execution of Fendall *v.* Towers, and which was in his hands separate and distinct from any other money at the time the execution of Deneale *v.* Young and Fendall was delivered to him; but the court gave it as their opinion that he had not a right, and was not bound so to do.

The case was now argued by Simms for the plaintiff in error; and by C. Lee and Swann for the defendant.

For the plaintiff in error, it was contended,

1ſt. That the court below was not authorized to render judgment at any other term than that next ſucceeding the return of the execution.

2dly. That the teſtimony offered to prove the inſolvency of Fendall, was competent for that purpoſe and ought not to have been rejected.

3dly. That the defendant below ought to have been permitted to prove the truſtees of Fendall not entitled to receive the money on the execution of Fendall *v.* Towers.

4thly. That Turner had a right to levy the execution of Deneale *v* Young and Fendall, on the money of Fendall in his hands.

1ſt. The act of aſſembly giving this remedy againſt Sheriffs ought to be conſtrued ſtrictly, becauſe it is a penal law, inaſmuch as it ſubjects the officer to a penalty of 15 per cent. per annum, for not paying over the money levied upon an execution; and becauſe this ſummary proceſs by motion is in derogation of the common law proceedings.

The words of the act are that "upon a motion made to "the next ſucceeding general court, or other court from "whence ſuch writ ſhall iſſue," "*ſuch* court is hereby au- "thorized and required to give judgment accordingly;" that is "ſuch *next* ſucceeding court." The court in April was the next ſucceeding court; but the court in July, at which this judgment was rendered, had no juriſdiction of the cauſe. And although conſent will take away error, yet it will not give juriſdiction.

2d. The teſtimony offered to prove the inſolvency of Fendall, ought to have been admitted.

By the act of aſſembly reſpecting inſolvent debtors (*reviſed code p.* 314, 315, *ſections* 40 *and* 41) upon the debtor's delivering his ſchedule and taking the oath, all his eſtate becomes veſted, by act of law, in the ſheriff of the county, and debts due to him are to be recovered *in the name of the ſheriff*. This money was either the money of Fendall, and ſo veſted in the ſheriff as part of the eſtate in poſſeſſion, or elſe it was a choſe in action, and then the

TURNER v. FENDALL.

ſheriff is the only perſon entitled to recover it. In either caſe by ſhowing the inſolvency of Fendall, we ſhow that the title is out of him, ſo that he cannot ſupport this motion. The act of aſſembly does not make the act of the magiſtrates in adminiſtering the oath, and granting the warrant of diſcharge of an inſolvent debtor, a matter of record. Third perſons have no means of proving the fact of inſolvency but by parol teſtimony. It muſt be proved like any other matter in pais. We offered the beſt evidence which the nature of the caſe will admit. We offered the original warrant of diſcharge under the hands and ſeals of the magiſtrates, and parol proof that they were magiſtrates at the time and had acted as ſuch for many years before, together with evidence of their hand writing. General reputation has always been conſidered as ſufficient proof of the official character of a magiſtrate.

3d. The defendant below ought to have been permitted to ſhew that the truſtees of Fendall were not entitled to the money. The notice in this caſe was given by Fendall *for his truſtees*. Turner could not know whoſe claims he had to oppoſe, whether thoſe of Fendall alone, or thoſe of his truſtees. It was neceſſary for him, therefore, to ſhew that neither the one nor the others were entitled to recover upon this motion; and he came prepared to do this, but the court would not ſuffer him to do it. Fendall, by reaſon of his inſolvency and the conſequent operation of law in transferring all his rights to the ſheriff, could not recover in his own name for his own uſe and benefit; but ſtill as courts of law will protect truſts and equitable rights where they are made to appear, and as the transfer of the eſtate and effects of an inſolvent debtor, which takes place by the operation of law, does not transfer thoſe things which the inſolvent has merely as truſtee, and as the name of Fendall might therefore ſtill be uſed for the benefit of the truſtees; it was competent and proper for the defendant below to ſhew that the truſtees had not that equitable right which the law will protect.

4th. The fourth point ſeems to divide itſelf into two parts.

1ſt. Can money be taken upon a *fieri facias* in any caſe?

2d. Can the officer levy a *fieri facias* on money in his own hands which he has collected for the use of the debtor?

1st. It is a general principle that all goods and chattels, the property of the debtor, may be taken in execution, and when an officer has it in his power to satisfy an execution to him directed, it is his duty to do it, and he is liable to the creditor if he fails so to do. The money of a debtor is a part of his goods and chattels; it follows, that it is liable to an execution. There is no possible reason why it should not be so. It is said there are some old authorities to the contrary, and that the reason given is that money cannot be sold. *Doug.* 219. *Armistead v. Philpot.* But the reason of selling the goods taken on execution is that money may be raised, and surely the execution may as well be satisfied by taking money itself, as by taking goods which must be sold to raise the money. In 2. *Shower*, 166. *Rex v. Webb*, it is said that by a *levari facias* "the sheriff may take ready money." And in this respect there is no difference between a *levari facias* and a *fieri facias*.

The law is expressly laid down in *Dalt. Sheriff* 145 *and* 543, that money may be taken on a *fieri facias*.

2d. If money in the possession of the debtor may be taken, does the money being in the hands of the sheriff make any difference?

In the case of *Rex v. Bird*, 2 *Show.* 87, "it was resolved "by the court, on motion, that on a *fieri facias* the sheriff "may sell the goods, and if he *pay the money to the party*, "*it is good*, and the court will allow of such return, because "the plaintiff is thereby satisfied; although the writ run, "*ita quod habeat coram nobis, &c.*" The same doctrine is held in 5. *Co.* 90. *(a.) Hoe's case.*

If then the sheriff might have paid this money to Fendall, and had so paid it, he would have been bound to seize it again instantly to satisfy the execution of Deneale. If he might have done this, and if it was his duty to satisfy the execution of Deneale; where was the necessity of his

TURNER v. FENDALL.

going through the ceremony of a payment of the money to Fendall. Here it is ſtated by the officer that he kept the money of Fendall diſtinct and ſeparate from all other money, and that he levied the execution of Deneale on that identical money. This is in ſubſtance the ſame thing as if the money had been paid over to Fendall and afterwards ſeized by the officer.

On the part of the defendant in error, it was ſaid in reply,

1ſt. As to the power of the court to give judgment at a term ſubſequent to the term next after the return of the execution, that although the act of Aſſembly may be penal, and although the remedy may be in derogation of the common law proceedings, yet, like all other ſtatutes, it muſt have a reaſonable conſtruction. It could never be ſuppoſed to intend that if the court did not give the judgment at the firſt term, the juriſdiction which they once had ſhould ceaſe.

2dly. The fact of Fendall's inſolvency was not material to the queſtion before the court, becauſe any perſon who was equitably entitled to the money would not be precluded from his claim by this judgment; and by the act of aſſembly no one but the creditor in whoſe name the judgment was rendered is entitled to this ſummary proceſs againſt the officer who refuſes to pay the money levied upon the execution; and if any other perſon was in equity entitled to the money he muſt ſtill uſe the name of Fendall. The name of the nominal creditor muſt be uſed, or the remedy given by the ſtatute would be wholly loſt. He is the only perſon who could acknowledge a ſatisfaction upon record, and it ought not to be in the power of the officer to allege an equitable claim in another perſon to ſupport his own improper act. 3 *Cro.* 166, 176. *Benſon v. Flower.* In that caſe the creditor had become bankrupt after the money was made upon the execution and before the return; and upon the return the aſſignees contended that they had the right to receive the money, but the court ordered it to be paid to the bankrupt, becauſe the aſſignees were no parties to the ſuit, and the bankrupt was the only perſon who could acknowledge ſatisfaction upon the record; and the money, being levied by the ſheriff before the aſſignment, was to be conſidered

as *in custodia legis*, and so not assignable. It was not the money of the bankrupt at the time of the bankruptcy, because it did not become his money *until he received it.*

But if the insolvency of Fendall were material, still the evidence adduced was not conclusive of the fact, nor even competent to prove it. It was not the best evidence which the nature of the case admitted. If the act of the magistrates was a simple act in pais, yet they themselves were the most competent witnesses to prove the fact, and their testimony would be better evidence than a paper purporting to be signed by W. Herbert and R. West, who do not style themselves magistrates, even if their hand writing should be proved. It does not appear that they were dead, or that their testimony could not be obtained. And as to common report being evidence of their being magistrates, it certainly was not the best evidence, because their commissions, and the certificate of their taking the requisite oaths of office, were matters of record. *Espinasse*, *N. P.* 741. When the acts of magistrates are questioned in the county in which they are said to be justices, common report may be sufficient, because all persons are supposed to be obliged to take notice of the officers of their county. But in this case they were alleged to be justices of a foreign county. The county of Fairfax is no part of the district of Columbia.

But this was not a trial by jury, and it is very questionable whether in such a case, a rejection of admissible evidence can be assigned for error, with any more propriety than an admission of incompetent testimony.

3d. It is contended that Turner ought to have been permitted to shew that the trustees of Fendall had no right to receive the money. The answer to that is, that the court were not trying the right of the trustees, and could not look into their equitable claims. The court were sitting as a court of law, and not as a court of chancery. If the trustees had an equitable right, they were not precluded from asserting it in a proper manner—if they had not, it did not affect the present question. If they had a *legal* right they would not be barred by the judgment in this case. In whatever light the subject is viewed, it appears to be perfectly immaterial to the present question.

TURNER v. FENDALL.

4th. But the fourth point includes the real merits of this controverſy. Had the officer a right to ſatisfy the execution of Deneale *v.* Young and Fendall, out of the money in his hands levied by virtue of the execution of Fendall *v.* Towers?

1ſt. Money cannot in any caſe be taken by the officer upon an execution. It is a general principle that on a *fieri facias* the goods taken cannot be delivered to the creditor in ſatisfaction of the debt, but muſt be ſold; and the books give this as a reaſon why money cannot be taken. Another reaſon may be, that money cannot be identified. But the law is different in Virginia from the Engliſh law, in reſpect to the proceedings on executions.

By the act of aſſembly reſpecting executions, *reviſed code p.* 309. *Sec.* 12 *and* 13, the officer, on *all* executions, having publiſhed notice of the time and place of ſale, ten days before ſuch ſale, "*ſhall proceed to ſell* by auction the "goods and chattels ſo taken, or ſo much thereof as ſhall "be ſufficient to ſatisfy the judgment or decree, for the "beſt price that can be got for the ſame." Here it is evident that the legiſlature did not contemplate the caſe of money itſelf being liable to be taken on execution; for they have made it the duty of the officer, in *all* caſes of execution, to advertiſe and *ſell* the goods taken. But the next ſection is ſtill ſtronger, for it provides "that if the owner "of ſuch goods and chattels ſhall give ſufficient ſecurity "to ſuch ſheriff or officer, to have the *ſame goods and* "*chattels* forthcoming *at the day of ſale*, it ſhall be law-"ful for the ſheriff or officer to take a bond from ſuch "debtor and ſecurities, payable to the creditor, reciting "the ſervice of ſuch execution, and the amount of money "or tobacco due thereon, and with condition to have the "goods or chattels forthcoming at the day of ſale ap-"pointed by ſuch ſheriff or officer, and ſhall thereupon "ſuffer the ſaid goods and chattels to remain in the poſ-"ſeſſion, and at the riſk of the debtor until that time." It would be abſurd to ſuppoſe an officer obliged to appoint a day of ſale for ſelling money; yet the giving of a forthcoming bond is a right which the debtor has by law; he is entitled to the delay on giving the ſecurity required. But the bond cannot be taken unleſs a day of ſale is appointed, becauſe there can be no other day on which the

bond can become forfeited. Hence then it is clear that the legiſlature went upon the ground that money could not be taken on an execution, or they would have excepted ſuch a caſe from the general words of the law. But if money was liable to be taken on a *fieri facias*, it was a caſe which muſt have often happened, and could not have eſcaped the recollection of every member of the legiſlature.

A ſtrong argument ariſes from the want of adjudged caſes on this point, and the total deficiency of precedent in practice within our own knowledge.

In the caſe of *Armiſtead v. Philpot*, cited from *Doug.* 219, Lord Mansfield confeſſes that there are old caſes which ſay that money cannot be taken in execution, even though found in the defendant's ſcrutoire, and does not cite any caſes to the contrary. It is true, he ſays, the reaſon given is a *quaint* one, but he does not ſay it was not good. In that caſe the money levied for the debtor was ordered to be paid by the ſheriff to the creditor who had an execution, but there was no oppoſition except as to the attorney's fees on the firſt execution, which were compromiſed, and the court and bar agreed that the motion was of the *firſt impreſſion*.

2d. But, ſecondly, this was not the money of Fendall until it was paid to him; and therefore if the law be, as is contended, that money of the debtor may be taken in execution, yet the principle does not apply to this caſe. By the receipt of the money by the ſheriff, Fendall did not become entitled to the individual pieces of coin. The remedy againſt the officer was not detinue or trover, but an action of debt or on the caſe. The officer became the *debtor* of Fendall for ſo much money, and there is no reaſon why it ſhould be more liable to an execution in the hands of the ſergeant, than in thoſe of any other individual; it was neither the goods nor chattels of Fendall but a mere choſe in action. Fendall could not compel the officer to pay it before the return day of the execution. If in the mean time the money had been loſt or deſtroyed by robbery, fire, enemies, lightening or tempeſt, it muſt have been the loſs of the officer and not of Fendall. The command of the writ of *fieri facias*, according to its form as

TURNER v. FENDALL.

prescribed by the act of assembly, (*revised code, p.* 306) is "that you have the said sum of money *before the judges of* "*our said court*, the day of *to render to the said* "(*creditor*,) of the debt and damages aforesaid." And the form of the return contained in the same act, p. 307, is, "by virtue of this writ to me directed, I have caused to "be made the within mentioned sum of of the "goods and chattels of the within named A. B. *which* "*said sum of before the judges within mentioned, at* "*the day and place within contained, I have ready, as that* "*writ requires.*"

The form of the writ and return is the best possible evidence of the duty of the officer. He is obliged to have the money in court, to be *there* paid to the creditor; and nothing will excuse him from an exact compliance with the command of the writ, but payment to the person named as creditor in the execution; and even this not as a matter of right but of favor. In the case of *Rex v. Bird* cited from 2 *Shower* 87, it is only said that a payment to the party will be *allowed* by the court, and the reason given is because the plaintiff is thereby *satisfied.* "But this is "only by permission of the court and not by force of the "law." 2 *Bac. ab* 352. Now if the plaintiff is not satisfied, the reason fails, and consequently the rule does not hold good. In 2 *Bac. ab* 352, it is said, "in *strictness* the mo- "ney is to be brought into court."

In the case of *Canon v. Smallwood*, 3 *Lev.* 203, 204, it is said that the payment of the money to the plaintiff was by permission of the court, not *ex rigore juris*; and the court often orders the sheriff to bring the money into court, and does not permit the plaintiff to have it; of which power the court would by this means be deprived.

In the case of *Benson v. Flower* before cited from 3 *Cro.* 166, 176, it is expressly stated that the money, at the time of the bankruptcy, being *in custodia legis*, that is, in the hands of the sheriff, was not the property of the bankrupt, and did not become so until he received it. And in the case of *Armistead and Philpot* the money was first brought into court, and there ordered by the court to be paid to the second creditor, on *affidavit*, that other goods and chattels could not be found. This case shews, as strongly as pos-

ſible, the neceſſity of the ſheriff's obeying the command of the writ in bringing the money into court, inſtead of paying it over to the creditor out of court, becauſe otherwiſe the act of the ſheriff would deprive the court of the power of making ſuch an order, and might, in many caſes, deprive the debtor of the opportunity of obtaining ſpeedy juſtice, on a motion to quaſh the execution for irregularity or any other cauſe. Beſides, the ſheriff might go on and levy for one creditor after another, until the whole ſum ſhould be ſwallowed up in his commiſſions.

No caſe can be found in which it has been permitted to be done at the diſcretion of the ſheriff, and yet it is a caſe which muſt happen in every day's practice if it could be done.

The Chief Juſtice delivered the opinion of the court.

This was a motion made by the defendant in error againſt the now plantiff in the circuit court at Alexandria, under an act of the Virginia aſſembly, which declares that "if any ſheriff, under ſheriff or other officer, ſhall "make return on any writ of fieri facias or venditioni "exponas, that he hath levied the debt, damages or coſts "as in ſuch writ is required, or any part thereof, and "ſhall not immediately pay the ſame to the party to "whom the ſame is payable, or his attorney," "it ſhall "and may be lawful for the creditor at whoſe ſuit ſuch "writ of fieri facias or venditioni exponas," "ſhall iſ-"ſue, upon a motion made at the next ſucceeding gene-"ral court, or other court from whence ſuch writ ſhall "iſſue, to demand judgment againſt ſuch ſheriff, officer or "under ſheriff, or ſecurities of ſuch under ſheriff, for the "money or tobacco mentioned in ſuch writ, or ſo much as "ſhall be returned, levied on ſuch writs," "with intereſt "thereon at the rate of 15 per centum per annum from "the return day of the execution, until the judgment "ſhall be diſcharged; and ſuch court is hereby authorized "and required to give judgment accordingly, and to "award execution thereon; provided ſuch ſheriff or offi-"cer have ten days previous notice of ſuch motion." That Turner had been ſergeant of the town of Alexandria, and had returned on a writ of fieri facias, iſſued on a judgment rendered by the court of huſtings for that corpora-

TURNER v. FENDALL.

tion, in favour of Philip Richard Fendall, that he had made the debt and had levied thereon a writ of fieri facias iſſued on a judgment obtained by William Deneale againſt Robert Young and Phillip R. Fendall, merchants, trading under the firm of Robert Young and Co.

Before the next ſucceeding term of the court of huſtings would have arrived, that court was aboliſhed, and all its powers and duties transferred to the circuit court of the diſtrict of Columbia for the county of Alexandria.

To the firſt term of the circuit court notice was given that a judgment would be moved for, and the notice was ſigned "Philip Richard Fendall, for the truſtees of the ſaid Philip Richard Fendall."

The defendant did not appear to the notice, and it was continued to the ſucceeding term, when the parties appeared, and the defendant, to prove that P. R. Fendall had taken the oath of an inſolvent debtor and was thereupon diſcharged, offered in evidence a warrant ſigned William Herbert and R. Weſt, diſcharging the ſaid Philip R. Fendall out of cuſtody, as an inſolvent debtor, and further offered to prove the hand writing of the ſaid Herbert and Weſt, and alſo to prove, by oral teſtimony, that the ſaid Philip Richard Fendall did take the oath of an inſolvent debtor before the ſaid William Herbert and Roger Weſt, and that they were on the 21ſt of March, 1800, the time of adminiſtering the ſaid oath and granting the ſaid certificate, magiſtrates for the county of Fairfax. This teſtimony was rejected by the court as not being legal evidence to eſtabliſh the fact, and to this opinion an exception was taken.

The defendant alſo offered to ſhew that the truſtees of Philip R. Fendall were not entitled to the money levied by virtue of the execution mentioned in the notice, which teſtimony was likewiſe rejected by the court; and, to this opinion alſo, a bill of exceptions was taken.

The defendant then produced the execution iſſued in favour of Deneale v. Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young and Co. with the return thereon, ſhowing that it had

been levied on the money of Philip R. Fendall then in his hands, and alleged that the officer had a right and was bound to levy the ſaid execution on the ſaid money, but the court was of opinion that he had not a right ſo to do, and to this opinion alſo an exception was taken. The court then proceeded to render judgment, on the notice, for the plaintiff; to which judgment a writ of error has been ſued out of this court; and the errors aſſigned and relied on are,

1ſt. That the court for the county of Alexandria was not empowered to render judgment in this caſe at any term ſubſequent to that next ſucceeding the return of the execution.

2dly. That the teſtimony offered to the court to prove the inſolvency of Philip R. Fendall, and rejected, was legal teſtimony to prove the fact for which it was adduced, and ought therefore to have been admitted.

3dly. That the defendant in the court below ought to have been permitted to prove the truſtees of Philip R. Fendall not entitled to receive the money to recover which the notice was given, and,

4thly. That the officer had a right to levy the execution of Deneale on the money of Philip R. Fendall in his hands.

To ſupport the firſt error aſſigned, the words of the act of aſſembly giving the motion have been relied on as only empowering the court to render judgment in this ſummary mode, at the term next ſucceeding that to which the execution has been returned.

That is, that although the plaintiff has brought his caſe rightly into court, yet if, from any cauſe whatever, the court ſhall be unable to render judgment at the firſt term, the ſuit muſt be diſmiſſed and the plaintiff muſt loſe his remedy. The words muſt be very plain indeed which will force a court to put upon them ſo irrational a conſtruction as this. On recurrence to the act relied on it does not appear that a reſtriction ſo unuſual and ſo unjuſt in itſelf, has been impoſed. The words "ſuch court," on fair conſtruction, refer to the court in which

TURNER v. FENDALL.

the motion has been made, and not to the term to which notice was given. The difficulty therefore which would have preſented itſelf, if the notice had been given to a term ſubſequent to that next ſucceeding the return of the execution, has no exiſtence in this caſe.

In conſidering the ſecond error aſſigned, the court was ſatisfied that the proceedings before magiſtrates, in caſes of inſolvent debtors, are entirely matters *in pais* and are therefore to be proved by parol and other teſtimony. The evidence offered was certainly legal evidence to eſtabliſh the fact for which it was adduced. The court however is not ſatisfied of its ſufficiency; but without determining that queſtion, and without determining whether in a caſe where there is no jury, a judgment ought, for the rejection of teſtimony which was admiſſible in law, to be reverſed in any ſtate of things, or the cauſe ſhould be conſidered as if the teſtimony had been received; it is the opinion of all the judges, that the party is bound to ſhow the relevancy of the fact intended to be eſtabliſhed, to the caſe before the court.

In the preſent cauſe the fact to be eſtabliſhed was the inſolvency of Fendall, which inſolvency is not ſhown to have been material in the caſe, ſince nothing appears in the record to induce an opinion that the proceeding could have been in any other name than his.

Although then the teſtimony rejected was proper and legal evidence towards eſtabliſhing the fact, yet the court committed no error in rejecting that teſtimony, for which their judgment ought to be reverſed, becauſe the fact does not appear to have been relevant to the cauſe under their conſideration.

On the third error aſſigned, the opinion of the court is, that whoever might in equity be entitled to the money, or to the uſe of Fendall's name, the notice as given could only be ſuſtained by ſhowing the legal right of Fendall to recover. A legal right in the truſtees would have defeated the action, for it is inſtituted in the name of Philip R. Fendall, although it may be for the benefit of his truſtees, and neither the reverſal or affirmance of this judgment would affect the right of the truſtees to proceed in their own names.

The fourth point is one of conſiderable importance and difficulty. In diſcuſſing it two queſtions have been made at the bar.

1ſt. Can an execution be levied on money?

2dly. Can it be levied on money in the hands of the officer?

The principle that an execution cannot be levied on money has been argued to be maintainable under the authority of adjudged caſes, and under the letter and meaning of the act of the Virginia legiſlature on the ſubject of executions.

Yet no ſuch adjudged caſe has been adduced. Lord Mansfield, in the caſe cited from *Douglaſs* 219, ſaid "he "believed there were old caſes where it had been held that "the ſheriff could not take money in execution even though "found in the defendant's ſcrutoire, and that a quaint "reaſon was given for it, viz. that money could not be "ſold," and it is believed that there may be ſuch caſes, but certainly there are alſo caſes in which the contrary doctrine has been held. In 2d *Shower* 166, it is laid down expreſsly that money may be taken on a *levari facias*, and no difference in this reſpect is perceived between the two ſorts of execution. In *Dalton's Sheriff*, 145, it is alſo ſtated in terms that money may be taken in execution on a *fieri facias*. The court can perceive no reaſon in the nature of the thing why an execution ſhould not be levied on money, That given in the books, viz. that it cannot be ſold, ſeems not to be a good one. The reaſon of a ſale is that money only will ſatisfy the execution, and if any thing elſe be taken it muſt be turned into money; but ſurely, that the means of converting the thing into money need not be uſed, can be no adequate reaſon for refuſing to take the very article to produce which is the ſole object of the execution.

The act of aſſembly concerning executions has alſo been relied on as ſhowing that only ſuch articles can be taken as may be ſold. But the proviſions of the act can only be conſidered as regulating the ſale of ſuch articles as in their nature require to be ſold, and not as exempting

TURNER v. FENDALL.

from execution ſuch property as need not be ſold. The object is not the ſale but money, and if the money can be made without a ſale it cannot be unlawful to do ſo. But in the caſe of an execution for tobacco money may be ſold, and therefore may be executed, and it would be ſtrange if by an execution ordering a ſheriff to make money, money could not be taken, and yet might be taken on an execution ordering him to make ſome other article.

It is the opinion of the court that money may be taken in execution, *if in the poſſeſſion of the defendant;* but the queſtion of greater difficulty is, whether it may be taken by the officer before it has been paid to the perſon entitled to receive it.

The general rule of law is that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it in his power to ſatisfy an execution in his hands, it is his duty to do ſo, and if he omits to perform his duty he muſt be accountable to thoſe who may be injured by the omiſſion. But has money, not yet paid to the creditor, become his property? That is, although his title to the ſum levied may be complete, has he the actual legal ownerſhip of the ſpecific pieces of coin which the officer may have received? On principle the court conceives that he has not this ownerſhip. The judgment to be ſatisfied is for a certain ſum, not for the ſpecific pieces which conſtitute that ſum, and the claim of the creditor on the ſheriff ſeems to be of the ſame nature with his claim under the judgment, and one which may be ſatisfied in the ſame manner. No right would exiſt to purſue the ſpecific pieces received by the officer, although they ſhould even have an ear mark, and an action of debt, not of detinue, may be brought againſt him if he fails to pay over the ſum received, or converts it to his own uſe. It ſeems to the court that a right to ſpecific pieces of money can only be acquired by obtaining the legal or actual poſſeſſion of them, and until this is done there can be no ſuch abſolute ownerſhip as that an execution may be levied on them. A right to a ſum of money in the hands of a ſheriff can no more be ſeized than a right to a ſum of money in the hands of any other perſon, and however wiſe or juſt it may be to give ſuch a remedy, the law does not appear yet to have given it. The dictum of judge Bul-

ler, in the caſe in 1 Durnford and Eaſt 370, proves that the mere poſſeſſion of money, as a truſtee, does not give to the poſſeſſor, before a converſion, ſuch a property in it, as to render it liable for his debts; but does not manifeſt an opinion that the perſon for whoſe uſe it was received, but to whoſe poſſeſſion it has not come, is to be conſidered as the legal owner of the ſpecific pieces themſelves, ſo that they have become, in contemplation of law, his goods and chattels. Indeed it is obſervable in that caſe, that if the money had been due to the pariſh at the time the bankruptcy of the defendant, who was an overſeer of the poor, took place, the pariſh would have been in no better condition than other creditors, and would have poſſeſſed no excluſive property in the money claimed.

Although the dictum of judge Buller may appear to militate ſomewhat againſt this poſition, yet the principle of the deciſion is in its favor, for the judgment of the court is declared to be founded on the fact that the debt was not a debt till after the bankruptcy.

The caſe cited from 3d Croke, 166, 176, expreſsly ſtates the property of the money while in the hands of the ſheriff, not to be in the creditor; and although the inference of the court from that principle does not appear to have been warranted, yet the principle itſelf is believed to be certainly correct.

In the caſe of Armiſtead v. Philpot, Doug. 219, the court directed the money of the debtor to be paid to the creditor, whoſe execution was in the hands of the ſheriff holding that money alſo; but this direction would have been unneceſſary if the ſheriff had poſſeſſed a previous right to make the appropriation.

It is ſtated in *Barnes' notes*, 214, to have been adjudged in *trinity term*, 32*d and* 33*d of George* 2, *in the caſe of Staple v. Bird*, where a ſheriff had levied an execution on money in his hands, that he ſhould, notwithſtanding this execution, pay the money to the perſon entitled to the benefit of the firſt judgment. It is true that in that caſe the perſon in whoſe name the judgment was rendered, was not entitled to the money received under it, but the caſe is not ſtated to have been decided on that principle; and

TURNER v. FENDALL.

the very frequency of such a state of things furnishes an argument of no inconsiderable weight against the right to levy an execution on money so circumstanced. The equitable right of persons, whose names do not appear in the execution, ought to be preserved; and considerable injustice might result from imposing on the sheriff the duty of deciding at his peril on such rights.

Considering the case then either on principle or authority, it appears to the court that the creditor has not such a legal property in the specific pieces of money levied for him and in the hands of the sheriff, as to authorize that officer to take those pieces in execution as the goods and chattels of such creditor.

But the money becomes liable to such execution the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. It appears unreasonable that the law should direct a payment under such circumstances. If the money shall be seized the instant of its being received by the creditor, then the payment to him seems a vain and useless ceremony which might well be dispensed with; and if the money should, by being so paid, be withdrawn from the power of the officer, then his own act would put beyond his reach, property rendered by law liable to his execution, and which of consequence the law made it his duty to seize.

The absurdity involved in such a construction led the court to a further consideration of the subject.

The mandate of a writ of fieri facias as originally formed, is that the officer have the money in court on the return day, there to be paid to the creditor. Forms of writs furnish strong evidence of what was law when they were devised, and of the duty of the officer to whom they are directed. Originally it was regularly the duty of the officer to have the money in court, and it has been held, that not even payment to the creditor himself could excuse the non-performance of this duty. The rigor of this rule has been considerably relaxed, but the form of the writ, as directed by a late act of the legislature of Virginia, yet is, that the money shall be in court on the return day, and there appears no excuse for omitting this duty, unless

it ſhall have been paid to the creditor. The ſheriff may certainly make ſuch payment out of court, if no circumſtance occurs which legally obſtructs or oppoſes it, ſuch as an injunction from the court of chancery, in which caſe, by the law of Virginia, the money muſt be returned; or an execution againſt the goods and chattels of the perſon to whom the money in his hands ſhall be payable. In the latter caſe it ſeems to the court ſtill to be the duty of the ſheriff to obey the order of the writ and to bring the money into court, there to be diſpoſed of as the court may direct. This was done in the caſe of *Armiſtead v. Philpot*, and in that caſe the court directed the money to be paid in ſatisfaction of the ſecond execution. This ought to be done whenever the legal and equitable right to the money is in the perſon whoſe goods and chattels are liable to ſuch execution.

In the caſe of Turner and Fendall, the ſheriff not having brought the money into court, but having levied an execution on it while in his hands, has not ſufficiently juſtified the non-payment of it to the creditor; and therefore the court committed no error in rendering judgment againſt him on the motion of that creditor. If the payment of the damages ſhould be againſt equity, that was not a ſubject for the conſideration of the court of law which rendered the judgment.

Judgment affirmed.

WILLIAM MARBURY
v.
JAMES MADISON, SECRETARY OF STATE OF THE UNITED STATES.

FEBRUARY, 1803.

AT the laſt term, viz. December term, 1801, William Marbury, Dennis Ramſay, Robert Townſend Hooe, and William Harper, by their counſel, Charles Lee, eſq. late attorney general of the United States,

MARBURY v. MADISON.

The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U States, it being an exercise of *original* jurisdiction not warranted by the constitution.

Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.

An act of congress repugnant to the constitution can not become a law.

The courts of the U. States are bound to take notice of the constitution.

A commission is not necessary to the appointment of an officer by the executive—Semb.

A commission is only *evidence* of an appointment

Delivery is not necessary to the validity of letters patent

The President cannot authorize a secretary of state to omit the perform-

severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that enquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals re-

ſpecting the nomination of the applicants to the ſenate, and of their advice and conſent to the appointments, yet their requeſt has been denied, and their petition rejected. They have therefore been compelled to ſummon witneſſes to attend in court, whoſe voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramſay, and the printed journals of the ſenate of 31 January, 1803, reſpecting the refuſal of the ſenate to ſuffer their ſecretary to give the information requeſted. He then called Jacob Wagner and Daniel Brent, who had been ſummoned to attend the court, and who had, as it is underſtood, declined giving a voluntary affidavit. They objected to being ſworn, alleging that they were clerks in the department of ſtate and not bound to diſcloſe any facts relating to the buſineſs or tranſactions in the office.

ance of thoſe duties which are enjoined by law.

A juſtice of peace in the diſtrict of Columbia is not removeable at the will of the Preſident

When a commiſſion for an officer not holding his office at the will of the Preſident, is by him ſigned and tranſmitted to the ſecretary of ſtate to be ſealed and recorded, it is irrevocable; the appointment is complete.

A mandamus is the proper remedy to compel a ſecretary of ſtate to deliver a commiſſion to which the party is intitled.

Mr. Lee obſerved, that to ſhew the propriety of examining theſe witneſſes, he would make a few remarks on the nature of the office of ſecretary of ſtate. His duties are of two kinds, and he exerciſes his functions in two diſtinct capacities; as a public miniſterial officer of the United States, and as agent of the Preſident. In the firſt his duty is to the United States or its citizens; in the other his duty is to the Preſident; in the one he is an independent, and an accountable officer; in the other he is dependent upon the Preſident, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This diſtinction is clearly pointed out by the two acts of congreſs upon this ſubject. The firſt was paſſed 27th July, 1789, vol. 1. p. 359, entitled "an act for eſtabliſhing an executive department, to be denominated the department of foreign affairs." The firſt ſection aſcertains the duties of the ſecretary ſo far as he is conſidered as a mere executive agent. It is in theſe words, "Be it "enacted, &c. that there ſhall be an executive depart- "ment, to be denominated the department of foreign af- "fairs, and that there ſhall be a principal officer therein, "to be called the ſecretary of the department of foreign "affairs, who ſhall perform and execute ſuch duties as "ſhall from time to time be enjoined on, or intruſted to "him by the Preſident of the United States, agreeable "to the conſtitution, relative to correſpondencies, com-

MARBURY v. MADISON.

"missions or instructions to or with public ministers or "consuls from the United States; or to negociations with "public ministers from foreign states or princes, or to "memorials or other applications from foreign public ministers, or other foreigners, or to such other matters "respecting foreign affairs as the President of the United "States shall assign to the said department; and further- "more, that the said principal officer shall conduct the "business of the said department in such manner as the "President of the United States shall from time to time "order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the "trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the "acts, records, and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they

ſhall have been ſigned by the Preſident. The fifth ſection provides for a ſeal of office, and that all copies of records and papers in his office, authenticated under that ſeal, ſhall be as good evidence as the originals. The ſixth ſection eſtabliſhes fees for copies, &c. The ſeventh and laſt ſection gives him the cuſtody of the papers of the office of the ſecretary of the old congreſs. Moſt of the duties aſſigned by this act are of a public nature, and the ſecretary is bound to perform them, without the control of any perſon. The Preſident has no right to prevent him from receiving the bills, orders, reſolutions and votes of the legiſlature, or from publiſhing and diſtributing them, or from preſerving or recording them. While the ſecretary remains in office the Preſident cannot take from his cuſtody the ſeal of the United States, nor prevent him from recording, and affixing the ſeal to civil commiſſions of ſuch officers as hold not their offices at the will of the Preſident, after he has ſigned them and delivered them to the ſecretary for that purpoſe. By other laws he is to make out and record in his office patents for uſeful diſcoveries, and patents of lands granted under the authority of the United States. In the performance of all theſe duties he is a public miniſterial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrolable by the Preſident; and if he neglects or refuſes to perform them, he may be compelled by mandamus, in the ſame manner as other perſons holding offices under the authority of the United States. The Preſident is no party to this caſe. The ſecretary is called upon to perform a duty over which the Preſident has no control, and in regard to which he has no diſpenſing power, and for the neglect of which he is in no manner reſponſible. The ſecretary alone is the perſon to whom they are entruſted, and he alone is anſwerable for their due performance. The ſecretary of ſtate, therefore, being in the ſame ſituation, as to theſe duties, as every other miniſterial officer of the United States, and equally liable to be compelled to perform them, is alſo bound by the ſame rules of evidence. Theſe duties are not of a confidential nature, but are of a public kind, and his clerks can have no excluſive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connexion with the ſecretary of ſtate, reſpecting which

MARBURY v. MADISON.

they cannot be bound to anſwer. Such are the facts concerning foreign correſpondencies, and confidential communications between the head of the department and the Preſident. This, however, can be no objection to their being ſworn, but may be a ground of objection to any particular queſtion. Suppoſe I claim title to land under a patent from the United States. I demand a copy of it from the ſecretary of ſtate. He refuſes. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I muſt ſhew that the patent is recorded in his office. My caſe would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, ſuppoſe a private act of congreſs had paſſed for my benefit. It becomes neceſſary for me to have the uſe of that act in a court of law. I apply for a copy. I am refuſed. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that ſuch an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no acceſs is to be had to the records, and no benefit to reſult therefrom.

The court ordered the witneſſes to be ſworn and their anſwers taken in writing, but informed them that when the queſtions were aſked they might ſtate their objections to anſwering each particular queſtion, if they had any.

Mr. Wagner being examined upon interrogatories, teſtified, that at this diſtance of time he could not recollect whether he had ſeen any commiſſion in the office, conſtituting the applicants, or either of them juſtices of the peace. That Mr Marbury and Mr. Ramſay called on the ſecretary of ſtate reſpecting their commiſſions. That the ſecretary referred them to him; he took them into another room and mentioned to them, that two of the commiſſions had been ſigned, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined anſwering the queſtion "who gave him that information;" and the court decided that he was not bound to anſwer it, becauſe it was not pertinent to this cauſe. He further teſtified that ſome of the commiſſions of the juſtices, but he believed not all, were recorded. He did not know whether the commiſſions of the applicants were

recorded, as he had not had recourſe to the book for more than twelve months paſt.

Mr. Daniel Brent teſtified, that he did not remember certainly the names of any of the perſons in the commiſſions of juſtices of the peace ſigned by Mr. Adams; but believed, and was almoſt certain, that Mr. Marbury's and col. Hooe's commiſſions were made out, and that Mr. Ramſay's was not; that he made out the liſt of names by which the clerk who filled up the commiſſions was guided; he believed that the name of Mr. Ramſay was pretermitted by miſtake, but to the beſt of his knowledge it contained the names of the other two; he believed none of the commiſſions for juſtices of the peace ſigned by Mr. Adams, were recorded. After the commiſſions for juſtices of the peace were made out, he carried them to Mr. Adams for his ſignature. After being ſigned he carried them back to the ſecretary's office, where the ſeal of the United States was affixed to them. That commiſſions are not uſually delivered out of the office before they are recorded; but ſometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of thoſe commiſſions of juſtices were ever ſent out, or delivered to the perſons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the ſecretary of ſtate.

Mr. Lincoln, attorney general, having been ſummoned, and now called, objected to anſwering. He requeſted that the queſtions might be put in writing, and that he might afterwards have time to determine whether he would anſwer. On the one hand he reſpected the juriſdiction of this court, and on the other he felt himſelf bound to maintain the rights of the executive. He was acting as ſecretary of ſtate at the time when this tranſaction happened. He was of opinion, and his opinion was ſupported by that of others whom he highly reſpected, that he was not bound, and ought not to anſwer, as to any facts which came officially to his knowledge while acting as ſecretary of ſtate.

The queſtions being written were then read and handed to him. He repeated the ideas he had before ſuggeſted, and ſaid his objections were of two kinds.

MARBURY v. MADISON.

1ſt. He did not think himſelf bound to diſcloſe his official tranſactions while acting as ſecretary of ſtate; and

2d. He ought not to be compelled to anſwer any thing which might tend to criminate himſelf.

Mr. Lee, in reply, repeated the ſubſtance of the obſervations he had before made in anſwer to the objections of Mr. Wagner and Mr. Brent. He ſtated that the duties of a ſecretary of ſtate were two-fold. In diſcharging one part of thoſe duties he acted as a public miniſterial officer of the United States, totally independent of the Preſident, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to anſwer as a marſhal, a collector, or any other miniſterial officer. But that in the diſcharge of the other part of his duties, he did not act as a public miniſterial officer, but in the capacity of an agent of the Preſident, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the diſcharge of this part of his duties, he was not bound to anſwer. He agreed that Mr. Lincoln was not bound to diſcloſe any thing which might tend to criminate himſelf.

Mr. Lincoln thought it was going a great way to ſay that every ſecretary of ſtate ſhould at all times be liable to be called upon to appear as a witneſs in a court of juſtice, and teſtify to facts which came to his knowledge officially. He felt himſelf delicately ſituated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to conſider of the ſubject.

The court ſaid, that if Mr. Lincoln wiſhed time to conſider what anſwers he ſhould make, they would give him time; but they had no doubt he ought to anſwer. There was nothing confidential required to be diſcloſed. If there had been he was not obliged to anſwer it; and if he thought that any thing was communicated to him in confidence he was not bound to diſcloſe it; nor was he obliged to ſtate any thing which would criminate himſelf; but that the fact whether ſuch commiſſions had been in the office or not, could not be a confidential fact; it

is a fact which all the world have a right to know. If he thought any of the queſtions improper, he might ſtate his objections.

Mr. Lincoln then prayed time till the next day to conſider of his anſwers under this opinion of the court.

The court granted it and poſtponed further conſideration of the cauſe till the next day.

At the opening of the court on the next morning, Mr. Lincoln ſaid he had no objection to anſwering the queſtions propoſed, excepting the laſt which he did not think himſelf obliged to anſwer fully. The queſtion was, what had been done with the commiſſions. He had no heſitation in ſaying that he did not know that they ever came to the poſſeſſion of Mr. Madiſon, nor did he know that they were in the office when Mr. Madiſon took poſſeſſion of it. He prayed the opinion of the court whether he was obliged to diſcloſe what had been done with the commiſſions.

The court were of opinion that he was not bound to ſay what had become of them; if they never came to the poſſeſſion of Mr. Madiſon, it was immaterial to the preſent cauſe, what had been done with them by others.

To the other queſtions he anſwered that he had ſeen commiſſions of juſtices of the peace of the diſtrict of Columbia, ſigned by Mr. Adams, and ſealed with the ſeal of the United States. He did not recollect whether any of them conſtituted Mr. Marbury, col. Hooe, or col. Ramſay, juſtices of the peace; there were when he went into the office ſeveral commiſſions for juſtices of peace of the diſtrict made out; but he was furniſhed with a liſt of names to be put into a general commiſſion, which was done, and was conſidered as ſuperſeding the particular commiſſions; and the individuals whoſe names were contained in this general commiſſion were informed of their being thus appointed. He did not know that any one of the commiſſions was ever ſent to the perſon for whom it was made out, and did not believe that any one had been ſent.

MARBURY v. MADISON

Mr. Lee then read the affidavit of James Marſhall, who had been alſo ſummoned as a witneſs. It ſtated that on the 4th of March 1801, having been informed by ſome perſon from Alexandria that there was reaſon to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the ſecretary of ſtate, for the commiſſions of the juſtices of the peace; that as many as 12, as he believed, commiſſions of juſtices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned ſeveral of them, and ſtruck a pen through the names of thoſe, in the receipt, which he returned. Among the commiſſions ſo returned, according to the beſt of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

Mr. Lee then obſerved, that having proved the exiſtence of the commiſſions, he ſhould confine ſuch further remarks as he had to make in ſupport of the rule to three queſtions:

1ſt. Whether the ſupreme court can award the writ of mandamus in any caſe.

2d. Whether it will lie to a ſecretary of ſtate in any caſe whatever.

3d. Whether in the preſent caſe the court may award a mandamus to James Madiſon, ſecretary of ſtate.

The argument upon the 1ſt queſtion is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political inſtitutions, but from the conſtitution and laws of the United States.

This is the *ſupreme* court, and by reaſon of its ſupremacy muſt have the ſuperintendance of the inferior tribunals and officers, whether judicial or miniſterial. In this reſpect there is no difference between a judicial and a miniſterial officer. From this principle alone the court of king's bench in England derives the power of iſſuing the writs of mandamus and prohibition. 3. Inſt. 70, 71.

Shall it be ſaid that the court of king's bench has this power in conſequene of its being the ſupreme court of judicature, and ſhall we deny it to this court which the conſtitution makes the *ſupreme* court? It is a beneficial, and a neceſſary power; and it can never be applied where there is another *adequate, ſpecific, legal remedy.*

The ſecond ſection of the third article of the conſtitution gives this court appellate juriſdiction in all caſes in law and equity ariſing under the conſtitution and laws of the United States (except the caſes in which it has original juriſdiction) with ſuch exceptions, and under ſuch regulations as congreſs ſhall make. The term "appellate juriſdiction" is to be taken in its largeſt ſenſe, and implies in its nature the right of ſuperintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the ſubject matter. 3 Bl. com. 402. It is a ſettled and invariable principle, that every right, when withheld, muſt have a remedy, and every injury its proper redreſs. 3 Bl. com. 109. There are ſome injuries which can only be redreſſed by a writ of mandamus, and others by a writ of prohibition. There muſt then be a juriſdiction ſome where competent to iſſue that kind of proceſs. Where are we to look for it but in that court which the conſtitution and laws have made ſupreme, and to which they have given appellate juriſdiction? Blakſtone, vol. 3, p. 110. ſays that a writ of mandamus is "a command iſſuing in the king's name "from the court of king's bench, and directed to any "*perſon*, corporation or inferior court, requiring them "to do ſome particular thing therein ſpecified, *which* "*appertains to their office and duty*, and which the court "has previouſly determined, or at leaſt ſuppoſes, to be "conſonant to right and juſtice. It is a writ of a moſt "extenſively remedial nature, and iſſues in all caſes where "the party has a right to have any thing done, *and has* "*no other ſpecific means of compelling its performance.*"

In the Federaliſt, vol. 2, p. 239, it is ſaid, that the word "appellate" is not to be taken in its technical ſenſe, as uſed in reference to appeals in the courſe of the *civil* law, but in its broadeſt ſenſe, in which it denotes nothing more than the power of one tribunal to review the pro-

MARBURY v. MADISON.

ceedings of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congreſs to preſcribe the forms of proceſs by which the ſupreme court ſhall exerciſe its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recogniſed by legiſlative proviſion as well as in judicial deciſions in this court.

Congreſs, by a law paſſed at the very firſt ſeſſion after the adoption of the conſtitution, vol. 1. p. 58, ſec. 13, have expreſsly given the ſupreme court the power of iſſuing writs of mandamus. The words are, "The ſupreme "court ſhall alſo have appellate jurisdiction from the cir- "cuit courts, and courts of the ſeveral ſtates, in the caſes "herein after ſpecially provided for; and ſhall have power "to iſſue writs of prohibition to the diſtrict courts, when "proceeding as courts of admiralty and maritime juris- "diction; and writs of *mandamus*, in caſes warranted by "the principles and uſages of law, to any courts appoint- "ed, or *perſons holding office*, under the authority of the "United States."

Congreſs is not reſtrained from conferring original jurisdiction in other caſes than thoſe mentioned in the conſtitution. 2 Dal. Rep. 298.

This court has entertained jurisdiction on a mandamus in one caſe, and on a prohibition in another. In the caſe of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the inſtance of the French miniſter, to compel judge Lawrence to iſſue a warrant againſt captain Barre, commander of the French ſhip of war Le Perdrix, grounded on an article of the conſular convention with France. In this caſe the power of the court to iſſue writs of mandamus, was taken for granted in the arguments of counſel on both ſides, and ſeems to have been ſo conſidered by the court. The mandamus was refuſed, becauſe the caſe in which it was required, was not a proper one to ſupport the motion. In the caſe of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated caſe of the French

corvette the Caſſius, which afterwards became a ſubject of diplomatic controverſy between the two nations. On the 5th Feb. 1794, a motion was made to the ſupreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *ſecretary at war*, commanding him to place Chandler on the invalid penſion liſt. After argument, the court refuſed the mandamus, becauſe the two acts of congreſs reſpecting invalids, did not ſupport the caſe on which the applicant grounded his motion. The caſe of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the diſtrict of Virginia, to command him to admit a perſon to ſubſcribe to the United States loan. Upon argument the mandamus was refuſed becauſe the applicant had not ſufficiently eſtabliſhed his title. In none of theſe caſes, nor in any other, was the power of this court to iſſue a mandamus ever denied. Hence it appears there has been a legiſlative conſtruction of the conſtitution upon this point, and a judicial practice under it, for the whole time ſince the formation of the government.

2d. The ſecond point is, can a mandamus go to a ſecretary of ſtate in any caſe? It certainly cannot in *all* caſes; nor to the Preſident in *any* caſe. It may not be proper to mention this poſition; but I am compelled to do it. An idea has gone forth, that a mandamus to a ſecretary of ſtate is equivalent to a mandamus to the Preſident of the United States. I declare it to be my opinion, grounded on a comprehenſive view of the ſubject, that the Preſident is not amenable to any court of judicature for the exerciſe of his high functions, but is reſponſible only in the mode pointed out in the conſtitution. The ſecretary of ſtate acts, as before obſerved, in two capacities. As the agent of the Preſident, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great ſeal, as recorder of deeds of land, of letters patent, and of commiſſions, &c. he is a miniſterial officer of the people of the United States. As ſuch he has duties aſſigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not conſiſtent with the policy of our political inſtitutions, or the manners of the citizens of the United States, that any miniſterial officer having public duties to perform,

MARBURY v. MADISON.

ſhould be above the compulſion of law in the exerciſe of thoſe duties. As a miniſterial officer he is compellable to do his duty, and if he refuſes, is liable to indictment. A proſecution of this kind might be the means of puniſhing the officer, but a ſpecific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any caſe, it may iſſue to a ſecretary of ſtate; for the act of congreſs expreſsly gives the power to award it, "in caſes warrant-"ed by the principles and uſages of law, *to any perſons* "*holding offices under the authority of the United States.*"

Many caſes may be ſuppoſed, in which a ſecretary of ſtate ought to be compelled to perform his duty ſpecifically. By the 5th and 6th ſections of the act of congreſs, vol. 1. p. 43. copies under ſeal of the office of the department of ſtate are made evidence in courts of law, and fees are given for making them out. The intention of the law muſt have been, that every perſon needing a copy ſhould be entitled to it. Suppoſe the ſecretary refuſes to give a copy, ought he not to be compelled? Suppoſe I am entitled to a patent for lands purchaſed of the United States; it is made out and ſigned by the Preſident who gives a warrant to the ſecretary to affix the great ſeal to the patent; he refuſes to do it; ſhall I not have a mandamus to compel him? Suppoſe the ſeal is affixed, but the ſecretary refuſes to record it; ſhall he not be compelled? Suppoſe it recorded, and he refuſes to deliver it; ſhall I have no remedy?

In this reſpect there is no difference between a patent for lands, and the commiſſion of a judicial officer. The duty of the ſecretary is preciſely the ſame.

Judge Patterſon enquired of Mr. Lee whether he underſtood it to be the duty of the ſecretary to deliver a commiſſion, unleſs ordered ſo to do by the Preſident.

Mr. Lee replied, that after the Preſident has ſigned a commiſſion for an office not held at his will, and it comes to the ſecretary to be ſealed, the Preſident has done with it, and nothing remains, but that the ſecretary perform thoſe miniſterial acts which the law impoſes upon him. It immediately becomes his duty to ſeal, record, and de-

liver it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled "An act concerning the district of Columbia," ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state.

MARBURY v. MADISON.

This cauſe may ſeem trivial at firſt view, but it is important in principle. It is for this reaſon that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themſelves to be duly appointed juſtices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to ſuffer them to be violated by the hand of power. The citizens of this diſtrict have their fears excited by every ſtretch of power by a perſon ſo high in office as the ſecretary of ſtate.

It only remains now to conſider whether a mandamus to compel the delivery of a commiſſion by a public miniſterial officer, is one of "the caſes warranted by the principles and uſages of law."

It is the general principle of law that a mandamus lies, if there be no other *adequate, ſpecific, legal* remedy; 3 Burrow, 1067, *King v. Barker, and al.* This ſeems to be the reſult of a view of all the caſes on the ſubject.

The caſe of Rex. v. Borough of Midhurſt, 1. Wils. 283, was a mandamus to compel the preſentment of certain conveyances to purchaſers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the caſe of Rex v. Dr. Hay, 1. W. Bl. Rep. 640, a mandamus iſſued to admit one to adminiſter an eſtate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a miniſterial act which concerns the public. 1. Wilſon, 283. 1. Bl. Rep. 640—although there be a more tedious remedy, Str. 1082. 4 Bur. 2188. 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admiſſion into a trading company. Rex v. Turkey Company, 2 Bur. 1000. Carthew 448. 5 Mod. 402; So it lies to put the corporate ſeal to an inſtrument. 4. Term. Rep. 699; to commiſſioners of the exciſe to grant a permit, 2 Term. Rep. 381; to admit to an office, 3 Term. Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will ſometimes lie in a

doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Siderfin, 169.

It lies to be admitted a member of a church, 3 Bur. 1265, 1043.

The process is as ancient as the time of Ed. 2d. 1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

Opinion of the court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus

MARBURY v. MADISON.

ſhould not iſſue, directing him to deliver to William Marbury his commiſſion as a juſtice of the peace for the county of Waſhington, in the diſtrict of Columbia.

No cauſe has been ſhewn, and the preſent motion is for a mandamus. The peculiar delicacy of this caſe, the novelty of ſome of its circumſtances, and the real difficulty attending the points which occur in it, require a complete expoſition of the principles, on which the opinion to be given by the court, is founded.

Theſe principles have been, on the ſide of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be ſome departure in form, though not in ſubſtance, from the points ſtated in that argument.

In the order in which the court has viewed this ſubject, the following queſtions have beeen conſidered and decided.

1ſt. Has the applicant a right to the commiſſion he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* iſſuing from this court?

The firſt object of enquiry is,

1ſt. Has the applicant a right to the commiſſion he demands?

His right originates in an act of congreſs paſſed in February 1801, concerning the diſtrict of Columbia.

After dividing the diſtrict into two counties, the 11th ſection of this law, enacts, "that there ſhall be appointed in and for each of the ſaid counties, ſuch number of diſcreet perſons to be juſtices of the peace as the preſident of the United States ſhall, from time to time, think expedient, to continue in office for five years.

It appears, from the affidavits, that in compliance with this law, a commiſſion for William Marbury as a juſtice of peace for the county of Waſhington, was ſigned by John Adams, then preſident of the United States; after which the ſeal of the United States was affixed to it; but the commiſſion has never reached the perſon for whom it was made out.

In order to determine whether he is entitled to this commiſſion, it becomes neceſſary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the poſſeſſion of thoſe evidences of office, which, being completed, became his property.

The 2d ſection of the 2d article of the conſtitution, declares, that, "the preſident ſhall nominate, and, by "and with the advice and conſent of the ſenate, ſhall "appoint ambaſſadors, other public miniſters and conſuls, "and all other officers of the United States, whoſe ap- "pointments are not otherwiſe provided for."

The third ſection declares, that "he ſhall commiſſion "all the officers of the United States."

An act of congreſs directs the ſecretary of ſtate to keep the ſeal of the United States, "to make out and record, and affix the ſaid ſeal to all civil commiſſions to officers of the United States, to be appointed by the Preſident, by and with the conſent of the ſenate, or by the Preſident alone; provided that the ſaid ſeal ſhall not be affixed to any commiſſion before the ſame ſhall have been ſigned by the Preſident of the United States."

Theſe are the clauſes of the conſtitution and laws of the United States, which affect this part of the caſe. They ſeem to contemplate three diſtinct operations:

1ſt, The nomination. This is the ſole act of the Preſident, and is completely voluntary.

2d. The appointment. This is alſo the act of the Preſident, and is alſo a voluntary act, though it can only be performed by and with the advice and conſent of the ſenate.

MARBURY v. MADISON.

3d. The commiſſion. To grant a commiſſion to a perſon appointed, might perhaps be deemed a duty enjoined by the conſtitution. "He ſhall," ſays that inſtrument, "commiſſion all the officers of the United States."

The acts of appointing to office, and commiſſioning the perſon appointed, can ſcarcely be conſidered as one and the ſame; ſince the power to perform them is given in two ſeparate and diſtinct ſections of the conſtitution. The diſtinction between the appointment and the commiſſion will be rendered more apparent, by adverting to that proviſion in the ſecond ſection of the ſecond article of the conſtitution, which authorizes congreſs "to veſt, by law, the appointment of ſuch inferior officers, as they think proper, in the Preſident alone, in the courts of law, or in the heads of departments;" thus contemplating caſes where the law may direct the Preſident to commiſſion an officer appointed by the courts, or by the heads of departments. In ſuch a caſe, to iſſue a commiſſion would be apparently a duty diſtinct from the appointment, the performance of which, perhaps, could not legally be refuſed.

Although that clauſe of the conſtitution which requires the Preſident to commiſſion all the officers of the United States, may never have been applied to officers appointed otherwiſe than by himſelf, yet it would be difficult to deny the legiſlative power to apply it to ſuch caſes. Of conſequence the conſtitutional diſtinction between the appointment to an office and the commiſſion of an officer, who has been appointed, remains the ſame as if in practice the Preſident had commiſſioned officers appointed by an authority other than his own.

It follows too, from the exiſtence of this diſtinction, that, if an appointment was to be evidenced by any public act, other than the commiſſion, the performance of ſuch public act would create the officer; and if he was not removeable at the will of the Preſident, would either give him a right to his commiſſion, or enable him to perform the duties without it.

Theſe obſervations are premiſed ſolely for the purpoſe of rendering more intelligible thoſe which apply more directly to the particular caſe under conſideration.

This is an appointment made by the Preſident, by and with the advice and conſent of the ſenate, and is evidenced by no act but the commiſſion itſelf. In ſuch a caſe therefore the commiſſion and the appointment ſeem inſeparable; it being almoſt impoſſible to ſhew an appointment otherwiſe than by proving the exiſtence of a commiſſion; ſtill the commiſſion is not neceſſarily the appointment; though concluſive evidence of it.

But at what ſtage does it amount to this concluſive evidence?

The anſwer to this queſtion ſeems an obvious one. The appointment being the ſole act of the Preſident, muſt be completely evidenced, when it is ſhewn that he has done every thing to be performed by him.

Should the commiſſion, inſtead of being evidence of an appointment, even be conſidered as conſtituting the appointment itſelf; ſtill it would be made when the laſt act to be done by the Preſident was performed, or, at furtheſt, when the commiſſion was complete.

The laſt act to be done by the Preſident, is the ſignature of the commiſſion. He has then acted on the advice and conſent of the ſenate to his own nomination. The time for deliberation has then paſſed. He has decided. His judgment, on the advice and conſent of the ſenate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the laſt act required from the perſon making it, neceſſarily excludes the idea of its being, ſo far as reſpects the appointment, an inchoate and incomplete tranſaction.

Some point of time muſt be taken when the power of the executive over an officer, not removeable at his will, muſt ceaſe. That point of time muſt be when the conſtitutional power of appointment has been exerciſed. And this power has been exerciſed when the laſt act, required from the perſon poſſeſſing the power, has been performed. This laſt act is the ſignature of the commiſſion. This idea ſeems to have prevailed with the legiſlature, when the act paſſed, converting the department

MARBURY v. MADISON.

of foreign affairs into the department of ſtate. By that act it is enacted, that the ſecretary of ſtate ſhall keep the ſeal of the United States, "and ſhall make out and re-"cord, and ſhall affix the ſaid ſeal to all civil commiſſions "to officers of the United States, to be appointed by the "Preſident:" "Provided that the ſaid ſeal ſhall not be af-"fixed to any commiſſion, before the ſame ſhall have been "ſigned by the Preſident of the United States; nor to "any other inſtrument or act, without the ſpecial war-"rant of the Preſident therefor."

The ſignature is a warrant for affixing the great ſeal to the commiſſion; and the great ſeal is only to be affixed to an inſtrument which is complete. It atteſts, by an act ſuppoſed to be of public notoriety, the verity of the Preſidential ſignature.

It is never to be affixed till the commiſſion is ſigned, becauſe the ſignature, which gives force and effect to the commiſſion, is concluſive evidence that the appointment is made.

The commiſſion being ſigned, the ſubſequent duty of the ſecretary of ſtate is preſcribed by law, and not to be guided by the will of the Preſident. He is to affix the ſeal of the United States to the commiſſion, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive ſhall ſuggeſt one more eligible; but is a preciſe courſe accurately marked out by law, and is to be ſtrictly purſued. It is the duty of the ſecretary of ſtate to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this reſpect, as has been very properly ſtated at the bar, under the authority of law, and not by the inſtructions of the Preſident. It is a miniſterial act which the law enjoins on a particular officer for a particular purpoſe.

If it ſhould be ſuppoſed, that the ſolemnity of affixing the ſeal, is neceſſary not only to the validity of the commiſſion, but even to the completion of an appointment, ſtill when the ſeal is affixed the appointment is made, and

the commiſſion is valid. No other ſolemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to inveſt the perſon with his office, is done; and unleſs the appointment be then made, the executive cannot make one without the co-operation of others.

After ſearching anxiouſly for the principles on which a contrary opinion may be ſupported, none have been found which appear of ſufficient force to maintain the oppoſite doctrine.

Such as the imagination of the court could ſuggeſt, have been very deliberately examined, and after allowing them all the weight which it appears poſſible to give them, they do not ſhake the opinion which has been formed.

In conſidering this queſtion, it has been conjectured that the commiſſion may have been aſſimilated to a deed, to the validity of which, delivery is eſſential.

This idea is founded on the ſuppoſition that the commiſſion is not merely *evidence* of an appointment, but is itſelf the actual appointment; a ſuppoſition by no means unqueſtionable. But for the purpoſe of examining this objection fairly, let it be conceded, that the principle, claimed for its ſupport, is eſtabliſhed.

The appointment being, under the conſtitution, to be made by the Preſident *perſonally*, the delivery of the deed of appointment, if neceſſary to its completion, muſt be made by the Preſident alſo. It is not neceſſary that the livery ſhould be made perſonally to the grantee of the office: It never is ſo made. The law would ſeem to contemplate that it ſhould be made to the ſecretary of ſtate, ſince it directs the ſecretary to affix the ſeal to the commiſſion *after* it ſhall have been ſigned by the Preſident. If then the act of livery be neceſſary to give validity to the commiſſion, it has been delivered when executed and given to the ſecretary for the purpoſe of being ſealed, recorded, and tranſmitted to the party.

But in all caſes of letters patent, certain ſolemnities are required by law, which ſolemnities are the evidences

MARBURY v. MADISON.

of the validity of the inſtrument. A formal delivery to the perſon is not among them. In caſes of commiſſions, the ſign manual of the Preſident, and the ſeal of the United States, are thoſe ſolemnities. This objection therefore does not touch the caſe.

It has alſo occurred as poſſible, and barely poſſible, that the tranſmiſſion of the commiſſion, and the acceptance thereof, might be deemed neceſſary to complete the right of the plaintiff.

The tranſmiſſion of the commiſſion, is a practice directed by convenience, but not by law. It cannot therefore be neceſſary to conſtitute the appointment which muſt precede it, and which is the mere act of the Preſident. If the executive required that every perſon appointed to an office, ſhould himſelf take means to procure his commiſſion, the appointment would not be the leſs valid on that account. The appointment is the ſole act of the Preſident; the tranſmiſſion of the commiſſion is the ſole act of the officer to whom that duty is aſſigned, and may be accelerated or retarded by circumſtances which can have no influence on the appointment. A commiſſion is tranſmitted to a perſon already appointed; not to a perſon to be appointed or not, as the letter encloſing the commiſſion ſhould happen to get into the poſt-office and reach him in ſafety, or to miſcarry.

It may have ſome tendency to elucidate this point, to enquire, whether the poſſeſſion of the original commiſſion be indiſpenſably neceſſary to authorize a perſon, appointed to any office, to perform the duties of that office. If it was neceſſary, then a loſs of the commiſſion would loſe the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In ſuch a caſe, I preſume it could not be doubted, but that a copy from the record of the office of the ſecretary of ſtate, would be, to every intent and purpoſe, equal to the original. The act of congreſs has expreſsly made it ſo. To give that copy validity, it would not be neceſſary to prove that the original had been tranſmitted and afterwards loſt. The copy would be complete evidence that the original had exiſted, and that the appointment had been made, but, not that the original had been tranſmitted. If indeed it ſhould appear that

the original had been miſlaid in the office of ſtate, that circumſtance would not affect the operation of the copy. When all the requiſites have been performed which authorize a recording officer to record any inſtrument whatever, and the order for that purpoſe has been given, the inſtrument is, in law, conſidered as recorded, although the manual labour of inſerting it in a book kept for that purpoſe may not have been performed.

In the caſe of commiſſions, the law orders the ſecretary of ſtate to record them. When therefore they are ſigned and ſealed, the order for their being recorded is given; and whether inſerted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a perſon requiring a copy, are aſcertained by law. Can a keeper of a public record, eraſe therefrom a commiſſion which has been recorded? Or can he refuſe a copy thereof to a perſon demanding it on the terms preſcribed by law?

Such a copy would, equally with the original, authorize the juſtice of peace to proceed in the performance of his duty, becauſe it would, equally with the original, atteſt his appointment.

If the tranſmiſſion of a commiſſion be not conſidered as neceſſary to give validity to an appointment; ſtill leſs is its acceptance. The appointment is the ſole act of the Preſident; the acceptance is the ſole act of the officer, and is, in plain common ſenſe, poſterior to the appointment. As he may reſign, ſo may he refuſe to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the underſtanding of the government, is apparent from the whole tenor of its conduct.

A commiſſion bears date, and the ſalary of the officer commences from his appointment; not from the tranſmiſſion or acceptance of his commiſſion. When a perſon, appointed to any office, refuſes to accept that office, the ſucceſſor is nominated in the place of the perſon who

MARBURY v. MADISON.

has declined to accept, and not in the place of the perſon who had been previouſly in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commiſſion has been ſigned by the Preſident, the appointment is made; and that the commiſſion is complete, when the ſeal of the United States has been affixed to it by the ſecretary of ſtate.

Where an officer is removeable at the will of the executive, the circumſtance which completes his appointment is of no concern; becauſe the act is at any time revocable; and the commiſſion may be arreſted, if ſtill in the office. But when the officer is not removeable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be reſumed.

The diſcretion of the executive is to be exerciſed until the appointment has been made. But having once made the appointment, his power over the office is terminated in all caſes, where, by law, the officer is not removeable by him. The right to the office is *then* in the perſon appointed, and he has the abſolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, ſince his commiſſion was ſigned by the Preſident, and ſealed by the ſecretary of ſtate, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but veſted in the officer legal rights, which are protected by the laws of his country.

To withhold his commiſſion, therefore, is an act deemed by the court not warranted by law, but violative of a veſted legal right.

This brings us to the ſecond enquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this enquiry the first question which presents itself, is, whether this can be arranged

MARBURY v. MADISON.

with that claſs of caſes which come under the deſcription of *damnum abſque injuria*—a loſs without an injury.

This deſcription of caſes never has been conſidered, and it is believed never can be conſidered, as comprehending offices of truſt, of honor or of profit. The office of juſtice of peace in the diſtrict of Columbia is ſuch an office; it is therefore worthy of the attention and guardianſhip of the laws. It has received that attention and guardianſhip. It has been created by ſpecial act of congreſs, and has been ſecured, ſo far as the laws can give ſecurity to the perſon appointed to fill it, for five years. It is not then on account of the worthleſsneſs of the thing purſued, that the injured party can be alleged to be without remedy.

Is it in the nature of the tranſaction? Is the act of delivering or withholding a commiſſion to be conſidered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our conſtitution in the ſupreme executive; and for any miſconduct reſpecting which, the injured individual has no remedy.

That there may be ſuch caſes is not to be queſtioned; but that every act of duty, to be performed in any of the great departments of government, conſtitutes ſuch a caſe, is not to be admitted.

By the act concerning invalids, paſſed in June, 1794, vol. 3. p. 112, the ſecretary at war is ordered to place on the penſion liſt, all perſons whoſe names are contained in a report previouſly made by him to congreſs. If he ſhould refuſe to do ſo, would the wounded veteran be without remedy? Is it to be contended that where the law in preciſe terms, directs the performance of an act, in which an individual is intereſted, the law is incapable of ſecuring obedience to its mandate? Is it on account of the character of the perſon againſt whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occaſions may be, the theory of this principle will certainly never be main-

tained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, "but injuries "to the rights of property can scarcely be committed by "the crown without the intervention of its officers; for "whom, the law, in matters of right, entertains no re- "spect or delicacy; but furnishes various methods of de- "tecting the errors and misconduct of those agents, by "whom the king has been deceived and induced to do a "temporary injustice."

By the act passed in 1796, authorising the sale of the lands above the mouth of Kentucky river (vol. 3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorised to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular case; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the

MARBURY v. MADISON.

exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

The power of nominating to the ſenate, and the power of appointing the perſon nominated, are political powers, to be exerciſed by the Preſident according to his own diſcretion. When he has made an appointment, he has exerciſed his whole power, and his diſcretion has been completely applied to the caſe. If, by law, the officer be removable at the will of the Preſident, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has exiſted cannot be made never to have exiſted, the appointment cannot be annihilated; and conſequently if the officer is by law not removable at the will of the Preſident; the rights he has acquired are protected by the law, and are not reſumable by the Preſident. They cannot be extinguiſhed by executive authority, and he has the privilege of aſſerting them in like manner as if they had been derived from any other ſource

The queſtion whether a right has veſted or not, is, in its nature, judicial, and muſt be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magiſtrate, and proceeded to act as one; in conſequence of which a ſuit had been inſtituted againſt him, in which his defence had depended on his being a magiſtrate; the validity of his appointment muſt have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commiſſion which has been made out for him, or to a copy of that commiſſion, it is equally a queſtion examinable in a court, and the deciſion of the court upon it muſt depend on the opinion entertained of his appointment.

That queſtion has been diſcuſſed, and the opinion is, that the lateſt point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the ſignature of the preſident, the ſeal of the United States was affixed to the commiſſion.

It is then the opinion of the court,

1ſt. That by ſigning the commiſſion of Mr. Marbury, the preſident of the United States appointed him a juſtice

MARBURY v. MADISON.

of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from the court of king's bench, "and directed to any person, corporation, or inferior "court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and "which the court of king's bench has previously determined, or at least supposes, to be consonant to right "and justice."

Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a "right to execute an office, perform a service, or exercise "a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is "kept out of possession, or dispossessed of such right, and

"has no other specific legal remedy, this court ought "to assist by mandamus, upon reasons of justice, as the "writ expresses, and upon reasons of public policy, to "preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all "occasions where the law has established no specific "remedy, and where in justice and good government "there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing "therein specified, which appertains to his office and "duty and which the court has previously determined, "or at least supposes, to be consonant to right and jus-"tice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered

MARBURY v. MADISON.

by ſome, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is ſcarcely neceſſary for the court to diſclaim all pretenſions to ſuch a juriſdiction. An extravagance, ſo abſurd and exceſſive, could not have been entertained for a moment. The province of the court is, ſolely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a diſcretion. Queſtions, in their nature political, or which are, by the conſtitution and laws, ſubmitted to the executive, can never be made in this court.

But, if this be not ſuch a queſtion; if ſo far from being an intruſion into the ſecrets of the cabinet, it reſpects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a ſubject, over which the executive can be conſidered as having exerciſed any control; what is there in the exalted ſtation of the officer, which ſhall bar a citizen from aſſerting, in a court of juſtice, his legal rights, or ſhall forbid a court to liſten to the claim; or to iſſue a mandamus, directing the performance of a duty, not depending on executive diſcretion, but on particular acts of congreſs and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual ſuſtains an injury, it cannot be pretended that his office alone exempts him from being ſued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the caſe be ſuch a caſe as would, were any other individual the party complained of, authorize the proceſs?

It is not by the office of the perſon to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of iſſuing a mandamus, is to be determined. Where the head of a department acts in a caſe, in which executive diſcretion is to be exerciſed; in which he is the mere organ of executive will; it is

again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United

MARBURY v. MADISON.

States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case—the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so

appointed, he has a right to the commiſſion which the ſecretary has received from the preſident for his uſe. The act of congreſs does not indeed order the ſecretary of ſtate to ſend it to him, but it is placed in his hands for the perſon entitled to it; and cannot be more lawfully withheld by him, than by any other perſon.

It was at firſt doubted whether the action of *detinue* was not a ſpecific legal remedy for the commiſſion which has been withheld from Mr. Marbury; in which caſe a mandamus would be improper. But this doubt has yielded to the conſideration that the judgment in *detinue* is for the thing itſelf, *or* its value. The value of a public office not to be ſold, is incapable of being aſcertained; and the applicant has a right to the office itſelf, or to nothing. He will obtain the office by obtaining the commiſſion, or a copy of it from the record.

This, then, is a plain caſe for a mandamus, either to deliver the commiſſion, or a copy of it from the record; and it only remains to be enquired,

Whether it can iſſue from this court.

The act to eſtabliſh the judicial courts of the United States authorizes the ſupreme court "to iſſue writs of "mandamus, in caſes warranted by the principles and "uſages of law, to any courts appointed, or perſons hold-"ing office, under the authority of the United States."

The ſecretary of ſtate, being a perſon holding an office under the authority of the United States, is preciſely within the letter of the deſcription; and if this court is not authorized to iſſue a writ of mandamus to ſuch an officer, it muſt be becauſe the law is unconſtitutional, and therefore abſolutely incapable of conferring the authority, and aſſigning the duties which its words purport to confer and aſſign.

The conſtitution veſts the whole judicial power of the United States in one ſupreme court, and ſuch inferior courts as congreſs ſhall, from time to time, ordain and eſtabliſh. This power is expreſsly extended to all caſes ariſing under the laws of the United States; and conſequently, in ſome form, may be exerciſed over the preſent

MARBURY v. MADISON.

case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the "supreme court shall have original jurisdiction in all "cases affecting ambassadors, other public ministers and "consuls, and those in which a state shall be a party. "In all other cases, the supreme court shall have appellate "jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to

MARBURY v. MADISON.

appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts pro-

hibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

MARBURY v. MADISON.

So if a law be in oppoſition to the conſtitution; if both the law and the conſtitution apply to a particular caſe, ſo that the court muſt either decide that caſe conformably to the law, diſregarding the conſtitution; or conformably to the conſtitution, diſregarding the law; the court muſt determine which of theſe conflicting rules governs the caſe. This is of the very eſſence of judicial duty.

If then the courts are to regard the conſtitution; and the conſtitution is ſuperior to any ordinary act of the legiſlature; the conſtitution, and not ſuch ordinary act, muſt govern the caſe to which they both apply.

Thoſe then who controvert the principle that the conſtitution is to be conſidered, in court, as a paramount law, are reduced to the neceſſity of maintaining that courts muſt cloſe their eyes on the conſtitution, and ſee only the law.

This doctrine would ſubvert the very foundation of all written conſtitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legiſlature ſhall do what is expreſsly forbiden, ſuch act, notwithſtanding the expreſs prohibition, is in reality effectual. It would be giving to the legiſlature a practical and real omnipotence, with the ſame breath which profeſſes to reſtrict their powers within narrow limits. It is preſcribing limits, and declaring that thoſe limits may be paſſed at pleaſure.

That it thus reduces to nothing what we have deemed the greateſt improvement on political inſtitutions—a written conſtitution—would of itſelf be ſufficient, in America, where written conſtitutions have been viewed with ſo much reverence, for rejecting the conſtruction. But the peculiar expreſſions of the conſtitution of the United States furniſh additional arguments in favour of its rejection.

The judicial power of the United States is extended to all caſes ariſing under the conſtitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on arti-"cles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or "*ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted "of treason unless on the testimony of two witnesses to "the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the consti-

MARBURY v. MADISON.

tution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly "swear that I will administer justice without respect "to persons, and do equal right to the poor and to the "rich; and that I will faithfully and impartially discharge "all the duties incumbent on me as accord-"ing to the best of my abilities and understanding, agree-"ably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

BAILEY E. CLARK,
v.
ROBERT YOUNG, AND CO.

CLARK *v.* YOUNG, & CO.

ERROR from the circuit court of the district of Columbia, sitting in the county of Alexandria.

This was an action on the case for goods sold and delivered by Young and co. to Clark. The declaration had three counts; one for the price of the goods; one on a *quantum valebant*; and one for money *had and received*.

The cause came on to be tried in the court below, on the general issue, at April term 1802.

The facts, on the trial, appeared to be, that on the 9th of September, 1794, Young and co: sold to Clark 400 bushels of salt, at 4/3 per bushel, amounting to 283 dollars and 33 cents. At the time of the sale and delivery of the salt, Clark assigned to Young and co. a negociable promissory note, made by one Mark Edgar to Pickersgill and co. and by them indorsed to Clark, dated September 5th, 1794, for 289 dollars, payable 60 days after date, at the bank of Alexandria. That Young and co. instituted a suit in Fairfax county court, in Virginia, against Clark, on his indorsement of this note; upon the trial of which cause, Clark, by his counsel, "prayed the opinion of the court, whether the plaintiffs could maintain "their action against him, previous to their having commenced a suit and obtained judgment against the drawer, or maker of the note; and until his insolvency "should appear;" "and the court gave it as their opinion that they could not; and directed the jury accordingly." Whereupon, a verdict was found for the defendant. It also appeared that at the time the note was indorsed by Clark to Young and co. as well as at the time when it became payable, Mark Edgar, the drawer of the note, was in bad circumstances, and was supposed and reputed to be insolvent. And that about the middle or last of December, 1794, he left Alexandria, and had never returned to it.

In Virginia it is not absolutely necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser

If a promissory note of a third person be indorsed by the purchaser of goods to the vender, as a conditional payment for the goods; Quere, Whether the vender is, in any case, obliged to sue the maker of the note before he can resort to the purchaser of the goods on the original contract of sale?

A suit against the defendant as indorser of the note, and a suit against the defendant for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.

It is not necessary for the

CLARK v. YOUNG, & CO.

The record which came up to this court contained three bills of exceptions:

1. The first contained a demurrer, on the part of the defendant below, to the evidence, which the circuit court refused to compel the plaintiffs to join. This exception was abandoned by the counsel for the plaintiff in error.

plaintiff to offer to return the note, to entitle him to bring suit for the goods sold.

2. The second bill of exceptions was in these words, "memorandum, in the trial of this cause, the defendant "gave in evidence to the jury, that the plaintiffs had in- "stituted a suit against him, in the county court of Fair- "fax, upon the indorsement of the promissory note of "Mark Edgar, herein before mentioned; the proceed- "ings in which said suit are in these words, to wit:" (here was inserted the record of Fairfax county court) "Whereupon, the counsel for the defendant prayed the "court to instruct the jury, that if, from the evidence "given in this cause, they should be of opinion, that "the promissory note aforesaid, was indorsed by the de- "fendant to the plaintiffs, in consequence of the goods, "wares, and merchandise, sold as aforesaid, (although "the said indorsement was not intended as an absolute "payment for the said goods, wares and merchandise, "or received as such by the plaintiffs, but merely as a "conditional payment thereof)" yet the receipt of the "said note, under such circumstances, and the institu- "tion of the aforesaid suit by the plaintiffs against the "defendant upon his indorsement aforesaid, made the "note so far a payment to said plaintiffs, for the said "goods, wares and merchandises, as to preclude them "from sustaining any action against the said defendant "for the goods, wares and merchandise, until they had ta- "ken such measures against the said Mark Edgar, as were "required by the laws of Virginia; and that the plain- "tiffs, having instituted the said suit upon the said note "against the defendant, and *that* having been decided "against the said plaintiffs, were barred from sustaining "this action against the said defendant. But the court "refused to give the instruction as prayed, and instructed "the jury that if they should be of opinion, from the "evidence, that the salt was sold and delivered by the "plaintiffs to the defendant, and the note was indorsed "by the defendant to the plaintiffs in consequence of the "salt sold, although the said indorsement was not in-

"tended as an abſolute payment, and received as ſuch "by the plaintiffs, but merely as a conditional payment "thereof, then the ſame is a diſcharge for the ſalt ſold, "unleſs it is proved that due diligence has been uſed by "the plaintiffs to receive the money due on the note; "but the bringing a ſuit againſt Mark Edgar, is not abſo- "lutely a neceſſary part of ſaid diligence; but the want of "ſuch ſuit may be accounted for by the inſolvency of the "ſaid Edgar, if proved; or by the conduct of the de- "fendant himſelf preventing ſuch ſuit; to which refuſal "and direction of the court, the defendant by his coun- "ſel prays leave to except," &c.

3. The third bill of exceptions ſtated, that "the de- "fendant by his counſel then prayed the opinion of the "court and their direction to the jury, that the defend- "ant was entitled to a credit for the amount of the ſaid "note, unleſs the plaintiffs could ſhew that they had in- "ſtituted a ſuit thereon againſt Edgar; or that Edgar had "taken the oath of an inſolvent debtor, or had abſcond- "ed, at the time the note became payable; or unleſs the "plaintiffs could ſhew that they had offered to return and "re-aſſign the ſaid note to the ſaid defendant previous to "the inſtitution of this ſuit. But the court having be- "fore, in the trial of the ſaid cauſe, on application by "the defendant to inſtruct the jury in the manner ſet "forth in his ſecond bill of exceptions, given directions "to the jury, comprehending all the material points con- "tained in the above prayer, refuſed to give the inſtruc- "tion as prayed, to which refuſal the defendant by his "counſel prayed leave to except," &c.

Verdict and judgment for the plaintiffs, for the full amount of the ſalt ſold; on which judgment the defend- ant brought a writ of error to this court.

Swann and Maſon for plaintiff in error.

C. Lee and E. J. Lee for defendants.

Swann.

If a note is indorſed to the vender at the time of the ſale of goods, although it is not agreed to be an abſo-

CLARK v. YOUNG, & CO.

lute payment, yet it is a conditional payment, viz. if the note be paid, or if it be indorſed over by the vender, or if he is guilty of laches; 5 *Term Rep.* 513. *Kearſlake v. Morgan.* In that caſe the plea (which was adjudged good on demurrer) ſtated that the note of one W. Peirce was indorſed by Morgan to Kearſlake, "*for and on account*" of the goods ſold, and that Kearſlake "then and there accepted and received the note *for and on account*" of the ſum due for the goods.

The defendants in error, if they have been guilty of laches, have made the note their own, and muſt ſuffer the loſs. 2 *Wilſon* 353. *Chamberlyn v. Delarive.*

The queſtion then ariſes, what was due diligence in this caſe. As the law ſtands in Virginia, Young and co. ought to have ſued Mark Edgar, the maker of the note. Such is the opinion of Judge Roane, in the caſe of *Maclie v. Davis*, 2 *Waſh.* 230, which is confirmed by the judgment of the court of appeals in the caſe of *Lee v. Love, in* 1. *Call's Reports*, 497.

But it is unneceſſary to reſort to the general law in Virginia on this point, becauſe the court of Fairfax county has decided the law in this caſe, and while that judgment ſtands unreverſed it is concluſive. The plaintiffs have made their election of two modes of proceeding to recover the money—having failed in one, they are barred as to the other. The ſame evidence is neceſſary to ſupport both, and this is the teſt to prove that they are for the ſame cauſe. 3 *Wilſon* 304. *Kitchen v. Campbell.*

That court has decided that Clarke was not liable on his indorſement of the note, becauſe Young and co. had not brought ſuit againſt Edgar; or, in other words, they have decided that Young and co. have not uſed due diligence, and therefore have made the note their own; and if ſo, the original contract for the ſalt is at an end. Yet the court below have decided this very queſtion differently. They have ſaid that a ſuit againſt Edgar, was not a neceſſary part of due diligence. The ſame queſtion, between the ſame parties, has been differently decided by the two courts.

Maſon, on the ſame ſide.

The court below was concluded by the deciſion of the county court of Fairfax. *Nemo bis vexari debet.* The plaintiffs below had two modes of recovering their money from Clark, viz. by a ſuit for the ſalt ſold, or by an action againſt Clark on his indorſement of the note. They made their election of the latter, and it has been decided againſt them. This ought to end the buſineſs. 3 *Wilſon* 304. *Kitchen v. Campbell.*

E. J. Lee, contra.

The queſtion ſeems to turn on the ſecond bill of exceptions. It appears by that, that the note was not given as an abſolute, but a conditional payment. It is unreaſonable to ſuppoſe that the condition was that Young and co. ſhould be obliged to proſecute a ſuit againſt Edgar through all the courts of Virginia.

The prayer was to inſtruct the jury that a ſuit muſt be proved to have been proſecuted againſt Edgar, and his inſolvency made to appear.

The judgment of the county court of Fairfax is no bar. It was not even a bar to a ſecond ſuit by Young and co. againſt Clark on the ſame note. For the opinion of that court was not generally that the ſuit would not lie againſt Clark on his indorſement, but that it would not lie againſt him *previous* to a ſuit againſt Edgar, and his inſolvency, being made to appear. Therefore, after proving Edgar inſolvent by a ſuit, Young and co. might have brought a ſecond ſuit againſt Clark and recovered, for any thing that appears by the opinion of that court.

If then Young and co. might have had a ſecond action upon the note, they may well bring a ſuit upon their original cauſe of action. The opinion of the Fairfax court was only that the plaintiffs had brought their action too ſoon.

It is ſaid this is the ſame cauſe of action which has been decided in the county court of Fairfax, and that the judgment in that court is a bar to this action.

CLARK v. YOUNG & CO.

In order to prove this, it is neceſſary to ſhew, not only that the ſame evidence applies to both, but the former judgment muſt have been upon the ſame *point*. And that point muſt be on the merits. 5 *Bac. ab. new edition, p.* 442.

In the caſe of *Kearſlake v. Morgan*, cited from 5 *Term Rep.* it did not appear what had become of the note; it might have been paid. Beſides that was a caſe under the ſtatute of Anne, which makes promiſſory notes a payment.

The caſe of *Chamberlyn v. Delarive*, *in* 2 *Wilſon* 353, was decided on the groſs negligence of the plaintiff in holding the order four months without making a demand of the money, until the drawee failed.

The refuſal of the court below to give the inſtruction prayed, and the direction which they did give to the jury, are both juſtified by the deciſions of the court of appeals of Virginia. That court has never decided, that a ſuit againſt the maker of the note is, in all caſes, neceſſary before reſort can be had to the indorſer. It is true that in the caſe of *Mackie v. Davis*, Judge Roane ſaid, that "the aſſignee of a bond acquires a *legal right* to bring "ſuit upon it, and to receive the money diſcharged from "any control of the aſſignor over the ſubject;" and that "it is, *therefore*, his *duty* to bring ſuit." But that was only an *obiter* opinion, not applicable to the point of the cauſe. It is certainly not a ſelf-evident truth, nor is it very apparent how the concluſion flows from the premiſes; and judge Carrington, in his opinion, in the *ſame caſe p.* 231, ſays "As to the lengths which it be-"hoves the aſſignee to go in purſuit of the obligor, before "he can reſort to the aſſignor, *it is unneceſſary to lay down* "*any general rule*; it may ſuffice to ſay, that in the pre-"ſent caſe he went far enough." In that caſe, indeed, a ſuit had been brought; but the courts of Virginia have never laid down any general rule as to what is due diligence in ſuch a caſe. In the caſe of *Lee v. Love*, in Call's reports, and *Minnis v. Pollard*, *Call* 226. it ſeems rather to be inferred that a ſuit is *not* in all caſes neceſſary. In the caſe of *Mackie v. Davis*, the court decided that the remedy of the aſſignee of a bond againſt the aſſignor, was by the *common law*; and it is clear from

the case of *Lambert v. Oakes, in* 1 *Lord Raymond* 443, that, by the common law, the indorsee of a note had his remedy against the indorser, if the money was not paid by the maker of the note on *demand*.

If, therefore, a suit against the maker of a note is not, in all cases, necessary to charge the indorser, the court below were right, both in refusing the instruction as prayed, and giving the opinion which they did.

C. Lee, on the same side.

1. The point arising from the first bill of exceptions is, that the court might well refuse to compel the plaintiffs below to join in demurrer to the evidence. This point being now agreed, I shall consider,

2. Whether the court did right in refusing the instruction to the jury, as prayed in the second bill of exceptions.

It is not necessary to enquire whether the instruction which they did give was right, but whether they were bound to give that which was asked.

If the note was not received at the time, as absolute payment for the salt, Young and co. had a right of action for the price of the salt, upon demand and refusal of payment of the note by Edgar. The liability of the indorser to the indorsee of a note is at common law, and not by the custom of merchants, or the statute of Anne. And by the common law, nothing more was necessary to fix that liability than a demand upon the maker of the note and his refusal to pay. Upon this, and this only, the right of action accrued against the indorser.

It is true that Young and co. had two remedies. They might either sue Clark upon his indorsement, or upon the original contract for the salt. Having failed in the former, they are not precluded from resorting to the latter. Their election of the first is not a waiver of the last.

The action in Fairfax county, on the note, was no bar to the action in the district of Columbia, upon the account. The note was no payment of the account, nor

CLARK v. YOUNG & CO.

was the former action for the same cause as the present. The causes of action, and the evidence necessary to support them, were entirely different. The declaration in Fairfax county contained three counts. 1st. A special count on Clark's indorsement of the note. 2d. For money lent. 3d. For money had and received.

In the present action the declaration has also three counts—1st. for the price of the salt sold; 2d. a quantum valebat; 3d. money had and received.

The same evidence will not support both actions. The indorsement of Clark is the evidence necessary in one. The delivery of the salt is the evidence to support the other.

In the case of *Kitchin v. Campbell*, 2 *Bl. Rep.* 827, 831, The court said, "The principal consideration is, whether it be *precisely* the same cause of action in both, appearing by proper averments, in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will sustain both the actions;" and cited *Putt and Royston*, 2. *Shower*, 211. *Raym.* 472. 3. *Mod.* 1. *Pollexfen* 634, *Mortimer and Wingate*, *Moor* 463. *Bro. action on the case* 97, 105.—And not only must it require the same evidence to support both, but in both the *question* must be the same.—2 Bl. Rep. *Kitchin v. Campbell*, *p.* 832—*Esp. Rep.* 130, *Ruff v. Webb.* This was an action for a servant's wages, against his master, who had given him a draft for the full amount of his wages, on a third person, which was not stamped. And although the plea stated that he accepted it in absolute payment, yet it was held to be no bar.

The case of *Kearslake v. Morgan* depends on the statute of Anne, which declares that a note given for a debt due by account, shall be a satisfaction, unless the plaintiff uses due diligence. No such statute exists in Virginia.

In the case of *Chamberlyn v. Delarive*, there was no demand at all upon the drawee of the bill. Neither of those cases therefore were like the present.

Swann, contra.

CLARK v. YOUNG & CO.

If a note is *agreed* to be taken in payment abſolutely, it is a ſatisfaction; but where there is no ſuch agreement, the law implies a condition that the holder ſhall uſe due diligence. The county court of Fairfax has decided that Young and co. have not uſed due diligence. That deciſion is valid and concluſive all over the world, until reverſed by a competent authority. How then does this caſe ſtand? Young and co. ſold ſalt to Clark, and received a note, as a conditional payment, or a collateral ſecurity, no matter which; which note they have made their own by their own laches. The maker of the note has become inſolvent and run away. Who ought to bear the loſs? The law ſays clearly, the perſon who has been negligent, who has not complied with the requiſites of the law.

It is immaterial whether the judgment in Fairfax, is an abſolute or a temporary bar; for if it is a temporary bar only, yet Young and co. have not done what that court decided to be neceſſary.

Maſon, on the ſame ſide.

A judgment on the ſame queſtion between the ſame parties is concluſive until reverſed. What is the ſame queſtion? It is the real merits, the matter of right between the parties.

The ſame evidence is not the criterion. Treſpaſs and trover require different evidence; yet if the merits of the ſame queſtion are the giſt of both, the one is a bar to the other. Here the queſtion was the ſame as in Fairfax, viz. Whether Young and co. had not been guilty of laches in reſpect to the note, for if they had, they had barred themſelves not only from a right to recover upon the note, but upon the original contract for the ſalt. One and the ſame queſtion will decide both caſes. That queſtion is upon the merits, and is in fact the only queſtion in diſpute between the parties.

It is not important whether the note was received as an abſolute or a conditional payment. For if it was a

CLARK v. YOUNG & CO.

conditional payment, the laches of Young and co. have made it abſolute. There is no evidence of notice to Clark, of the default of Edgar, until the bringing of the ſuit in Fairfax county, which was 18 months after the note became payable. Having two remedies for the price of the ſalt, Young and co. could not reſort to both. They made their election to ſue upon the note, and having purſued that remedy to judgment againſt themſelves, they are forever barred.

The county court of Fairfax have decided the only queſtion which exiſted between the parties, the negligence of the plaintiffs below, whereby they had made the note their own; and therefore they muſt abide the loſs.

Feb. 17th. *The chief juſtice* delivered the opinion of the court.

This was a ſuit brought by the defendants in error againſt the plaintiffs, in the circuit court of the diſtrict of Columbia ſitting in the county of Alexandria, and the declaration contains two counts for goods, wares and merchandizes ſold and delivered, and one for money had and received to their uſe. The cauſe came on to be tried on the general iſſue and a verdict was found for the plaintiffs below, on which the court rendered judgment.

At the trial of the cauſe it appeared that the ſuit was brought for a quantity of ſalt ſold and delivered by Robert Young and co. to Clark; after which Clark indorſed to Robert Young and co. a promiſſory note made by Mark Edgar to John Pickerſgill and co. which had been indorſed by them to the ſaid Clark, and which was payable 60 days after date.

This note was proteſted for non-payment; after which a ſuit was brought thereon by Robert Young and co. in the county court of Fairfax againſt Clark; and the declaration contained two counts, one on the indorſement, and the other for money had and received to the uſe of the plaintiffs. In this ſuit verdict and judgment was given for the defendant Clark, the court of Fairfax being of opinion that a ſuit could not be maintained againſt the indorſer

of the note, until a judgment had been first obtained against the drawer, and his insolvency made to appear.

After the determination of that action, this suit was instituted on the original contract; and, at the trial, the counsel for the defendant moved the court to instruct the jury, that if from the evidence given in the cause, they should be of opinion that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandizes sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandizes, or received as such by the plaintiffs, but merely as a conditional payment thereof, yet the receipt of the said note under such circumstances, and the institution of the aforesaid suit by the said plaintiffs against the said defendant, on his indorsement aforesaid, made the said note, so far a payment to the said plaintiffs, for the said goods, wares and merchandizes, as to preclude them from sustaining any action against the said defendant for the said goods, wares and merchandizes, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the suit aforesaid upon the said note against the said defendant, and *that* having been decided against the said plaintiffs, they were barred from sustaining this action against the said defendant.

This instruction the court refused to give, but directed the jury, that if they were of opinion, from the evidence, that the salt was sold and delivered as alleged, and that the promissory note aforesaid was indorsed by the defendant to the plaintiffs in consequence of the salt sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said salt or received as such by the plaintiffs, but merely as a conditional payment thereof, the same is a discharge to the defendant for the salt sold to him, unless it is proved that due diligence has been used to receive the money due on the note; but that the bringing suit on the said note against Mark Edgar was not essentially necessary to constitute the said diligence; and that the said diligence may be proved by other circumstances, and their omitting to bring the said suit against Edgar may be accounted for by the insolvency of Edgar,

CLARE v. YOUNG & CO.

if proved, or any conduct of the defendant which may have prevented the bringing of the ſaid ſuit.

To this opinion the counſel for the defendant excepted, and then prayed the court to direct the jury that the defendant was entitled to a credit for the amount of the *ſaid* note, unleſs the plaintiffs could ſhew that they had inſtituted a ſuit thereon againſt Edgar, or that Edgar had taken the oath of inſolvency, or abſconded at the time the note became payable, or unleſs the plaintiffs could ſhew that they had offered to return and re-aſſign the ſaid note to the ſaid defendant, previous to the inſtitution of this ſuit.

This direction the court refuſed to give, and referred the jury to their opinion already given on the principal points now ſtated and to which an exception had already been taken. This opinion was alſo excepted to. A verdict and judgment was then rendered for the plaintiff without giving credit for Edgar's note, which judgment is now brought into this court by writ of error.

On theſe exceptions it has been argued that the court has erred, becauſe,

1ſt. The conduct of the plaintiffs, Young and co. has diſabled them from maintaining this action, and ſuch ought to have been the direction to the jury.

2dly. The verdict and judgment in Fairfax court is a bar to this action.

The conduct of the plaintiffs was entirely before the jury, to be judged of by them from the evidence, excepting only that part of it reſpecting which the court gave an opinion. We are therefore only to enquire whether the opinion given by the court be erroneous.

It is agreed on both ſides that the note in this caſe was not received, as payment of the debt, and conſequently did not extinguiſh the original contract. It was received as a conditional payment only, and the opinion of the court was, that in ſuch a caſe the want of due diligence to receive the money due thereon would diſcharge the defendant. But the court proceeded to ſtate that due

diligence might be proved although no ſuit was inſtituted; and that circumſtances, ſuch as the known inſolvency of Edgar, the drawer of the note, or any conduct of Clark, preventing a ſuit, would excuſe Young and co. for not having inſtituted one.

This opinion of the court ſeems perfectly correct. The condition annexed to the receipt of the note can not be preſumed to have required that a ſuit ſhould be brought againſt a known inſolvent, or that it ſhould be brought againſt the will of the indorſer; if he choſe to diſpenſe with it, or took means to prevent it, nothing can be more unreaſonable than that he ſhould be at liberty to avail himſelf of a circumſtance occaſioned by his own conduct.

It is not intended to ſay that the perſon receiving ſuch a note is compellable, without ſpecial agreement, to ſue upon it in any ſtate of things. It is not deſigned to ſay that he may not, on its being proteſted, return it to the indorſer, and reſort to his original cauſe of action; it is only deſigned to ſay, that under the circumſtances of this caſe, nothing can be more clear than that there was no obligation to ſue.

The court gave no opinion that the ſuit in Fairfax was, or was not, a bar to that brought in the county of Alexandria.

It is however clear that no ſuch bar was created.

To wave the queſtion, whether in ſuch a caſe as this, with declarations for ſuch diſtinct cauſes, a verdict in a prior ſuit may be given in evidence as a bar to another ſuit really for the ſame cauſe of action: it is perfectly clear that in this caſe the ſame queſtion was not tried in both cauſes.

In Fairfax the point decided was, that the ſuit againſt the indorſer would not lie 'till a ſuit had been brought againſt the drawer; in the ſuit in Alexandria the point to be decided was whether the plaintiffs had loſt their remedy on the original contract, by their conduct reſpecting the note. Theſe were diſtinct points, and the merits of

CLARK v. YOUNG, & CO.

the latter case, were not involved in the decision of the former.

On the second bill of exceptions, the only real new point made, is, whether the action is maintainable unless Robert Young and co. had offered to return and reassign the note before the institution of the suit.

Unquestionably Clark is entitled to the benefit of the note, but as it was no extinguishment of the original cause of action, there was no absolute necessity to prove an offer of the note before the institution of the suit. Indeed it does not appear, in this bill of exceptions, whether the note was merely a collateral security, or a conditional payment. This is no where stated positively. In the first opinion of the court it is stated hypothetically, and that opinion must be considered on the presumption that such was the fact. But no such presumption is raised respecting the second bill.

Judgment affirmed with costs.

WILSON v. LENOX AND MAITLAND.

WILSON v. LENOX & AL.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange for the principal, interest, damages and *cost of protest*, must aver the *amount* of those costs of protest. Quere, whether if the holder of a bill of exchange, after due notice to

ERROR to the circuit court of the district of Columbia sitting at Alexandria, on a judgment obtained by the present defendants in error, against the plaintiff in error, in an action of *debt*, as indorser of a bill of exchange for £.300 sterling, drawn on the 2d January, 1799, at Alexandria, by A. and W. Ramsay, on Findley, Bannatyne and co. London, at ninety days sight, payable to Wilson, the plaintiff in error, and by him indorsed to the defendants. This bill was presented for acceptance on the 28th of February, 1799, and refused, and on the 1st of June, 1799, protested for non-payment. The declaration was "of a plea that he render unto them "the sum of £.300 sterling, with damages, interest and "*charges* of *protest*, on a protested bill of exchange, which

" to them he owes, and from them unjuſtly detains," and goes on to ſtate the drawing of the bill of exchange " *according to the cuſtom of merchants*," the indorſement by Wilſon to Lenox and Maitland; the refuſal of Findley, Bannatyne and co. to accept the bill on its being preſented for acceptance (but does not ſtate a proteſt for non-acceptance, nor notice of the non-acceptance given to Wilſon) and the proteſt, " *in due form, according to the cuſtom of merchants*," for non-payment; " of which the ſaid " defendant afterwards, to wit, on the day of " in the year aforeſaid, at the town and county " aforeſaid, had notice, whereby, and by force of the " act of aſſembly of the commonwealth of Virginia, in " ſuch caſe made and provided, action accrued to the " ſaid plaintiffs, to demand and have of the ſaid defend- " ant the ſaid ſum of £.300 ſterling, *with damages, in-* " *tereſt and charges of proteſt*; nevertheleſs, the ſaid de- " fendant, although thereto often required, hath not paid " unto the ſaid plaintiffs the ſaid ſum of three hundred " pounds ſterling, *with damages, intereſt and charges of* " *proteſt*, but the ſame to pay hath hitherto refuſed, and " ſtill doth refuſe, to the damage of the plaintiffs, 750 " *dollars*, and thereupon they bring ſuit, &c."

The indorſer of the non-payment by the drawee, charge the bill in account current againſt the drawer, and upon the whole of that account the balance due is leſs than the amount of the bill, the indorſer is thereby diſcharged? Whether the indorſer is diſcharged by the holder's receipt of part from the drawer, after due notice given to the indorſer? Whether it be neceſſary to aver a proteſt for non-acceptance in an action on proteſt for non-payment? Whether the drawer be a competent witneſs for the indorſer in an action againſt the latter?

The act of aſſembly of Virginia, which gives the action of *debt* on a proteſted bill of exchange (reviſed code, p. 121) provides, " that where any bill of exchange is or " ſhall be drawn for the payment of any ſum of money, " in which the value is or ſhall be expreſſed to be re- " ceived, and ſuch bill is or ſhall be proteſted for non-ac- " ceptance or non-payment, the drawer, or indorſer, " ſhall be ſubject to the payment of fifteen per centum " damages thereon, and the bill ſhall carry an intereſt of " five per centum per annum, from the date of the pro- " teſt, until the money, therein drawn for, ſhall be fully " ſatisfied and paid."

" §. 3. It ſhall be lawful for any perſon or perſons, " having a right to demand any ſum of money upon a " proteſted bill of exchange, to commence and proſe- " cute an action of *debt*, for *principal, damages, intereſt* " *and charges of proteſt*, againſt the drawers or indorſers " jointly, or againſt either of them ſeparately; and judg- " ment ſhall and may be given for ſuch principal, da-

WILSON v. LENOX & AL.

"mages and charges, and intereſt upon ſuch principal, "after the rate aforeſaid, to the time of ſuch judgment, "and for the intereſt upon the ſaid principal money re- "covered, after the rate of five per centum per annum, "until the ſame ſhall be fully ſatisfied."

"§. 4. In all bills of exchange given for any debt due "in current money of this commonwealth, or for cur- "rent money advanced and paid for ſuch bills, the ſum "in current money that was paid or allowed for the ſame, "ſhall be mentioned and expreſſed in ſuch bill, and in "default thereof, in caſe ſuch bill ſhall be proteſted, and "a ſuit brought for the recovery of the money due there- "by, the ſum of money expreſſed in ſuch bill, ſhall be "held and taken as current money, and judgment ſhall "be entered accordingly."

"§. 6. In any action which hath been, or ſhall be "commenced, and is or ſhall be depending for the reco- "very of any *ſterling* money, in any court of record "within this commonwealth, wherein the plaintiff or "plaintiffs ſhall recover, ſuch court ſhall have power, and "are hereby directed, by rule to be entered at the foot "of their judgment in ſuch action, to order ſuch judg- "ment to be levied or diſcharged in current money, at "ſuch a difference of exchange as they ſhall think juſt."

The cauſe, in the court below, was tried upon the plea of *nil debet*, and the jury found a verdict for the *debt in the declaration mentioned*, and one cent damages; it was therefore conſidered by the court, "that the ſaid "plaintiffs recover againſt the ſaid defendant *their debt* "*aforeſaid, amounting to three hundred pounds ſterling*, and "their damages aforeſaid, by the jurors aforeſaid, in "form aforeſaid aſſeſſed, and alſo their coſts, by them "about their ſuit in this behalf expended; and the ſaid "defendant in mercy, &c. But this judgment (damages "and coſts excepted) is to be diſcharged by the payment "of eight hundred and fifty-five dollars, twenty-three "cents."

The record which came up contains ſix bills of exceptions.

1. First. That the defendant Wilson produced in evidence to the jury the accounts of the plaintiffs Lenox and Maitland, against A. and W. Ramsay, the *drawers* of the bill, whereby the latter were charged as debtors to Lenox and Maitland, on the 22d of August, 1799, for the amount of the bill and damages in dollars and cents, among many other debts and credits, upon which whole accounts current, a balance of 1095 dollars only appeared to be due from A. and W. Ramsay to Lenox and Maitland; and thereupon prayed the opinion of the court whether by making the said bill an *item of account as stated in the aforesaid accounts* against the said A. and W. Ramsay, the said Wilson was not thereby, as indorser, discharged; and the court were of opinion that he was not.

2. Second. That the defendant offered to prove that the plaintiffs had received part of the money from the drawers of the bill *since* the defendant Wilson had notice of the protest, but the court were of opinion that the same, if proved, would not discharge Wilson as indorser.

3. Third. That the defendant offered to prove by the bill and protest, that after the protest of the said bill at the request of Roberts, Curtis and co. the then holders of the bill, it was paid by Dorin, Strange and co. to Roberts, Curtis and co. for the honor of Lenox and Maitland, the plaintiffs, and thereupon prayed the opinion of the court, whether, as the bill had been so paid, this action would lie against the defendant as indorser, and the court gave it as their opinion that it would lie.

4. Fourth. That the defendant prayed the opinion of the court, whether it was not incumbent on the plaintiffs to prove the value of current money received here for the bill upon which this action is brought, which bill is in these words: "Exchange for £.300 sterling, Alexandria, 2d "January, 1799. Ninety days after sight of this our first "of exchange, (second, third and fourth of the same te-"nor and date unpaid) pay to the order of William Wil-"son, esq. the sum of three hundred pounds sterling, for "value here received, and place it to account as advised "by Andrew and William Ramsay." "To Messrs. Find-"ley, Bannatyne and co. London." And the court gave it as their opinion, that it is not necessary for the plaintiffs

WILSON v. LENOX & AL.

to prove the value given here in current money for the ſaid bill.

5. Fifth. That the defendant offered to prove by the account thereunto annexed, that the bill, upon which this ſuit was brought, was given in the commonwealth of Virginia, either for dollars and cents due in the ſaid commonwealth, from A. and W. Ramſay to the plaintiffs, or for dollars and cents advanced by the plaintiffs, or ſome other perſons, for the ſaid A. and W. Ramſay, in the ſtate of New-York, and prayed the opinion of the court, whether, if the ſaid facts were proved to the jury, the ſaid bill ought not to be ſettled according to its nominal amount as current money of Virginia. Whereupon, the court inſtructed the jury, that if they were of opinion from the evidence offered, that the bill of exchange was given for any debt due from A. and W. Ramſay, in current money of the commonwealth of Virginia, or for current money advanced and paid for the ſaid bill, and the ſum in current money, that was paid or allowed for the ſame, is not expreſſed in the bill, the ſum expreſſed in the bill ſhall be held and taken as current money of Virginia; and if, from the evidence offered, they ſhould not be of that opinion, that the ſum expreſſed in the bill ſhall be taken and held, as ſo expreſſed, to wit, in ſterling money.

6. Sixth. That the defendant offered to examine William Ramſay, one of the drawers of the bill, to which the counſel for the plaintiffs objected, and the court gave it as their opinion, that the ſaid W. Ramſay was an incompetent witneſs in the cauſe.

The ſecond, third, fourth and fifth exceptions ſeem to have been abandoned in the argument in this court.

C. Lee, *E. J. Lee*, *and Swann* for plaintiff in error.

Simms for defendants.

The errors inſiſted on by the counſel for the plaintiff in error were,

1ſt. The opinion of the court below, as ſtated in the firſt bill of exceptions.

2d. The rejection of W. Ramſay as a witneſs.

3d. That there was no proteſt for *non-acceptance* of the bill.

4th. That the declaration does not ſtate any demand of payment of the bill, made on the drawees.

5th. The damages are not laid in the ſame currency as the debt.

6th. The jury have awarded that the *ſterling* debt ſhould be diſcharged by the payment of 855 *dollars and* 23 *cents*.

7th. The debt demanded is not certain.

E. J. Lee, for the plaintiff in error.

1ſt. The court below erred in not inſtructing the jury that the defendants in error, by charging the bill in account againſt the drawers, in the manner ſtated in the accounts, had diſcharged the indorſer. The court ought at leaſt to have left it to the jury to decide whether the circumſtances did not amount to a diſcharge of Wilſon.

By the account of Lenox and Maitland againſt the drawers of the bill, it appears that after charging the amount of the bill, and damages, intereſt and charges of proteſt, and turning the amount into dollars and cents at ſuch rate of exchange as the defendants in error pleaſed, there was only a balance of about 1000 dollars due to them from the drawers; it is not reaſonable that they ſhould recover more than is due to them againſt an innocent indorſer who muſt look to inſolvent drawers for his indemnification. The defendants have in fact given credit to the drawers for the amount due on the bill, and have agreed to liquidate it in account. If the holder of a bill receives part of the money from the acceptor without giving notice to the drawer, the latter is diſcharged. *Buller N. p.* 275. So if he receives part from the drawer, he diſcharges the indorſer. Here no notice was given to Wilſon; *

* *Chief Juſtice.*—Does the bill of exceptions ſtate that notice was not given to Wilſon? If it does not you can not argue upon the want of notice *E. J. Lee.*

WILSON v. LENOX & AL.

or if there was, it is waived by the conduct of Lenox and Maitland. In the cases of *Dingwall v. Dunster*, Doug. 247 (235.) it is true that judge Buller says, that nothing but an express agreement can discharge an acceptor, but the court are careful to distinguish between the case of an acceptor, and that of a drawer or indorser. The implication is, that there are many circumstances which will discharge the latter, without an express agreement. The court ought, at least, to have instructed the jury that they might infer a discharge from the circumstances of this case.*

2dly. W. Ramsay, the drawer of the bill, ought to have been admitted as a witness. He had no interest which would render him incompetent. The verdict in this case could not have been given in evidence either for or against the witness; and whether Lenox and Maitland recovered against Wilson, or not, he was still liable to an action as drawer—to Lenox and Maitland if they failed against Wilson—or to Wilson, if they succeeded. In the case of *Smith qui tam v. Prager*, 7 *Term, rep.* 62. the rule is clearly laid down to be, that "*no objection "could be made to the competency of a witness upon the ground "of interest, unless he were directly interested in the event of "the suit, or could avail himself of the verdict in the cause, "so as to give it in evidence on any future occasion in support of "his own interest.*" The objection only goes to his credit, unless the judgment can be given in evidence for him in any other suit. The same principle is confirmed in the case of *Jordaine v. Lashbrooke*, 7 *Term, rep.* 601, where, in a suit between the indorsee and the acceptor of a bill, the payee was called and allowed as a witness to defeat the action, by proving that the bill, although dated at Hamburgh, was in fact drawn in London, and so void for want of a stamp. It may be observed in that case, that

E. J. Lee.—It does not. But the declaration does not allege notice of the non-acceptance, nor of the non-payment; but only of the *protest* for non-payment, and a material fact not averred can not be presumed to have been proved.

* *Chase, Justice.* There is no doubt a drawer or indorser may be discharged in express terms; or by facts amounting to a discharge; but where the discharge is not express but by implication arising from facts, the jury, and not the court, are to decide whether it is a discharge; the court ought not to say it was a discharge.

it was admitted that there could be no objection on the ground of *interest*, but the objection relied on was, that the witness ought not to be permitted, from motives of policy as it respected mercantile credit, to impeach a negociable instrument to which he had assisted in giving currency by his indorsement; and even that objection was over-ruled. In the case of *Carter v. Pearce*, 1 *Term, rep.* 163, the court said that, "the bare possibility of an action being brought against a witness, is no objection to "his competency;" and that "in order to shew a witness "interested, it is necessary to prove that he *must* derive a "*certain* benefit from the determination of the cause one "way or the other."*

3dly. Here was no protest for non-acceptance, nor does the declaration state a demand of payment from the drawees, nor notice of the non-payment, or non-acceptance given to Wilson. The protest for non-payment is not evidence that the money was demanded at the time the bill became payable. 4 *Bac. ab.* 735, *Gwyllim's edition.*

In the case of *Rushton v. Aspinall*, *Doug.* 679. (653) it is expressly decided that the plaintiff must allege in his declaration a demand, and refusal of the acceptor *on the day when the note was payable*, and notice thereof to the indorser before he can be made liable; and that the want of such averments in the declaration is not cured by a verdict. And Lord Mansfield there lays down the rule to be, "that where the plaintiff has stated his title "or ground of action *defectively* or *inaccurately* (because, "to entitle him to recover, all *circumstances* necessary in "form and substance, to complete the title so imperfectly "stated, must be proved at the trial) it is a fair presumption, after a vereict, that they were proved; but that "where the plaintiff totally omits to state his title or "cause of action, it need not be proved at the trial, and "therefore there is no room for presumption."

The demand and refusal of the drawee to pay is the very substance of the plaintiffs' title to recover; and there-

* *Chase, Justice.* Upon the statute of gaming, usury and the like, but in no other case, are the drawers, indorsers, &c. competent witnesses. The cases all shew it.

WILSON v. LENOX & AL

fore the not ſetting it forth in the declaration is a total omiſſion of his cauſe of action.

4th. The damages are not laid in the ſame currency with the bills and the promiſe. To ſupport this objection he relied on the deciſion of the court of appeals of Virginia, in the caſe of *Scott's executors v. Call*, 1 *Waſh. Rep.* 115, and *Skipwith v. Baird*, 2 *Waſh.* 165.

C. Lee, on the ſame ſide.

1ſt. The queſtion to the court below was whether the plaintiffs by making the bills an item of the accounts, *as therein ſtated*, had not diſcharged the indorſer Wilſon. The accounts of Lenox and Maitland againſt the drawers of the bill, begin in 1798 and end in 1800. The bills are entered in account, on the 22d of Auguſt 1799, and charged with intereſt and damages; and the amount carried out from ſterling into dollars and cents, at ſuch rate of exchange as the defendants in error pleaſed. They have therefore changed the nature of the demand, and given credit to the drawers for a certain ſum in the currency of the United States. They have, as far as they were able, manifeſted their intention to give credit to A. and W. Ramſay.

Theſe circumſtances being ſubſequent to the notice to Wilſon are a diſcharge in law, and are equivalent to an expreſs diſcharge. If I am right the court ought to have inſtructed the jury that theſe facts diſcharged all perſons but A. and W. Ramſay. Perhaps the court might have left it to the jury to infer an intention to diſcharge the indorſer; but the court ought not to have inſtructed the jury that Wilſon was not thereby diſcharged as indorſer.

2d. The objection to the competency of W. Ramſay as a witneſs was not good. If he had any intereſt, it was in favor of the plaintiffs. The objection was made generally and goes to his proving any fact whatever. A witneſs may be competent to prove ſome facts and not others. He was competent to prove, not only that the bill was charged in account, but that it was given up, and came ſurreptitiouſly to the poſſeſſion of the plaintiffs, if the fact had been ſo. I ſtate this only to ſhew that he ought not

to have been wholly excluded. On a criminal profecution for forgery, the party, whofe name is forged, may be a witnefs, 1 *Dall.* 110. The doctrine that a man fhall not be permitted to difprove a paper to which he has put his name to give it credit, is over-ruled in the cafe of *Jordane and Laſhbroke* cited from 7 *Term. Rep.* 601. In the cafe of *Walpole v. Pulteney, cited in Doug.* 249 (237.) *in the note*, at the fecond trial of the cauſe at Guildhall at the fittings after Michaelmas term 1779, before Skynner, chief Baron, Alexander, the indorſer of the bill was ſworn as a witneſs for the acceptor, and no objection made to his competency. But in this caſe there is not any intereſt whatever in the witneſs. For if the evidence of Ramſay went to diſcharge Wilſon, ſtill it would not go to diſcharge Ramſay itſelf. There is a caſe alſo in Eſpinaſſe's reports, in which the acceptor was ſworn as a witneſs in a queſtion between the indorſee and drawer.

Simms, contra.

1ſt. The charge of the bill in account againſt the drawers, does not amount to a *legal* diſcharge of the indorſer. It is neither an expreſs or an implied diſcharge. The holder has a remedy againſt all or any of the indorſers or the drawer, until he gets full ſatisfaction. If he gives due notice to the party to whom he means to reſort, he is not bound to commence ſuit *inſtanter*. If he receives part from the drawer, it is ſo much to the benefit of the indorſer, and he has no right to complain. Due notice is all that the indorſer has a right to require, and if he does not then ſecure himſelf, it is his own fault. The caſe from *Buller, N. P.* 275, is not denied to be law; but Buller there ſays, "if the indorſee give credit to the "drawer, *without notice to the indorſer*, it will diſcharge "him." But here it is admitted that notice was given, and the allegation is, that notwithſtanding ſuch notice, the ſubſequent charge in the accounts of Lenox and Maitland againſt the drawers has diſcharged the indorſer.

Lenox and Maitland might have brought ſuit againſt the drawers, without prejudice to their claim againſt the indorſer; *a fortiori*, the charging a bill in account againſt the drawers cannot prejudice the claim againſt the indorſer.

2d. W. Ramſay was offered as a witneſs generally,

WILSON v. LENOX & AL.

without a releaſe from Wilſon. The court were right in rejecting him both on the grounds of intereſt and of public policy.

If judgment ſhould be rendered againſt Wilſon, Ramſay as drawer would be clearly liable to refund Wilſon the coſts of ſuit; and a relief from that liability was a clear intereſt.

A party to a negociable paper ought not to be permitted to diſcredit it.

An underwriter can not be a witneſs for another underwriter in an action upon the ſame policy.

The caſe in *Doug.* 247, does not affect the preſent. The note in 249, is of an ancient caſe; and there Walpole's own book was produced with a memorandum that Pulteney was diſcharged from his liability as acceptor.

All the caſes cited are where a party to the bill has been admitted as a witneſs either *ex neceſſitate*, or on the ground of public conveniency and policy. The caſe of *Jordane v. Laſhbrooke*, was one where the revenue would have been defrauded of the ſtamp duty, if the witneſs had been excluded; and to prevent that evil he was admitted.

In the caſes of uſury the maker of the note or other ſecurity is not admitted unleſs the debt has been paid. And in the caſe of forgery, it is a public criminal proſecution in which the injured party is always admitted.

The fault of the declaration, if it does exiſt, is cured by the verdict under the ſtatute of *jeofails* of Virginia, which declares, that no judgment after verdict ſhall be ſtayed or reverſed, for *miſpleading*, *inſufficient* pleading, *or for omitting the averment of any matter, without proving which, the jury ought not to have given ſuch verdict. Rev. Code*, 118. But the averment was not neceſſary. The declaration contains an allegation that the bill was proteſted *in due form, according to the cuſtom of merchants*, for non-payment; and by the cuſtom of merchants, the bill could not have been proteſted until demand and refuſal of payment.

But this action is grounded on the act of assembly, and not on the custom of merchants; and by the act it is only necessary that it should be a *protested* bill of exchange.

As to notice of the non-acceptance and non-payment not being alleged in the declaration, the fact is not so. The declaration alleges that the bill was presented for acceptance and refused; and afterwards, on the 1st of June, protested in due form according to the customs of merchants for non-payment; of *which*, (that is, of all the facts before recited) the defendant had notice, &c.

As to the damages being laid in current money; this is always done when tobacco, or foreign money is sued for. There are some unintelligible cases in the court of appeals of Virginia; but they have never decided the present point. In one case the court said that if the suit is for a sterling debt, its value must not be laid in current money, because the law of Virginia authorizes an action of debt for sterling money.

Simms, on a subsequent day, stated that a demand of payment was not necessary where the bill was not accepted, and cited *Lilly's entries*, 44 *and* 45. The declaration states the non-acceptance, and the protest for non-payment.*

He also mentioned a case in *Peake's reports*, where a party to a bill of exchange was refused as a witness; but did not produce the book.

Swann, in reply.

1. The plaintiffs below having assumed a rate of exchange, and charged the amount in account against the drawers, is conclusive evidence of their intention to extinguish the sterling debt.

2. The jury have awarded that the sterling debt should be discharged by the payment of 800 dollars†; the ba-

* *Chase, Justice.*—A protest for non-acceptance is absolutely necessary in the case of a foreign bill.

† The fact does not so appear in the record.

WILSON v. LENOX & AL.

lance of the account therefore, and not the rate of exchange, muſt have been the guide of the jury.

3. The teſtimony of Ramſay was not to deſtroy the paper, but to explain the nature of the conſideration; to ſhew that it was given for current money of Virginia, ſo as to bring it within the operation of the 4th ſection of the act of aſſembly reſpecting bills of exchange given for current money due in Virginia. This act applies as well between indorſee and indorſer, as between payee and drawer*; and if the bill was given for current money due in Virginia, the ſum mentioned in the bill is to be taken as current money, and not as ſterling.

4. A proteſt for non-acceptance, and a demand of payment from the drawee, at the time the bill became payable, were requiſite to enable the plaintiffs below to recover. *Kyd on bills*, 76, 87. It being an action on the ſtatute makes no difference, becauſe the ſtatute gives the action only to ſuch perſons as have "*a right to demand any "ſum of money upon a proteſted bill of exchange.*" The holder, therefore, muſt ſhew a right to demand the money, independent of the proviſions of the ſtatute; and to aſcertain whether he has ſuch a right, we muſt reſort to the cuſtom of merchants, and ſee whether he has complied with all the requiſites of that cuſtom.

5. This is an action of debt; and the demand is uncertain. The debt demanded is the *principal, damages, intereſt and charges of proteſt, without ſtating the amount of the charges of proteſt.* The principal is certain, becauſe it is ſtated to be £.300; and the damages and intereſt are certain, becauſe the law has aſcertained their relative proportion to the principal; but there is nothing in the declaration by which the amount of the charges of proteſt can be rendered certain.

6. The damages ought to have been laid in ſterling and not in dollars. The damages follow the nature of the debt. The act of aſſembly has authoriſed ſterling debts to be ſued for and recovered as ſuch. Sterling money is not to be conſidered as foreign money, 2 *Waſh.* 165, *Skipwith, v. Baird.* The court of appeals of Virginia in

* *Chief Juſtice.*—The law has been ſo conſtrued in Virginia.

that case decided that the damages must be laid in sterling.*

The court are to fix the rate of exchange; but here the jury have awarded at what sum in current money, the sterling debt should be paid, and it is evident that the 800 dollars which the jury said should discharge the debt, is not the exchange but the balance of account.†

Simms cited 3 *Dall.* 365, *Brown v. Barry*, to shew that a protest for non-acceptance was not necessary; and that a protest for non-payment being alleged in the declaration, it was not necessary to aver a demand of payment from the drawee.

C. Lee. The act of *jeofails* in Virginia is construed to be the same as that of England, although the words are somewhat broader. 2. *Wash.* 203. *Stevens v. White.*‡

Feb. 22d. At a subsequent day, the court having suggested an error, not noticed by the counsel, or not much relied on at the argument, as being apparently fatal, viz. that the costs of protest which are uncertain are joined as part of the debt declared for.

Chief Justice. In that case the court spake of the damages which constitute part of the debt in an action under the statute upon a bill of exchange, and not of those damages, which are demanded at the end of the declaration for the non payment of that debt. There is no such decision respecting the latter.

† *Chase, Justice.* If you have no law of Virginia authorising such a judgment, it is bad, because at common law no condition or alternative can be added to the judgment. It is not a good judgment at common law.

Chief Justice. If it is bad, the defendant cannot complain. It is for his benefit.

Chase, Justice. That may be the opinion of the chief justice; but I have considered the question in a greater case than this. I am well satisfied (and it will be difficult to alter my opinion) that at common law no condition can be annexed to a judgment.

Simms. It is the practice of Virginia. The law of Virginia allows discounts to actions of debt, and the judgment is to be rendered for the debt, to be discharged by the sum really due.

‡ *Chief Justice.* The decisions have been so, although the statute of Virginia is broader than the English statute. The general principle decided by the court of appeals of Virginia is, that a verdict will not cure the want of an averment of a material fact which goes to the gist of the action.

WILSON v. LENOX & AL.

Simms, for defendants in error, was now permitted to support the declaration.

1ſt. The declaration is ſufficiently certain. An action of debt will lie for what may eaſily be reduced to a certainty.

Nothing can be more eaſily aſcertained and rendered certain than charges of proteſt on a proteſted bill of exchange. They always appear upon the proteſt; and the indorſement on the proteſt is always conſidered as evidence of their amount. No other evidence is ever required.

Debt may be brought for a ſum capable of being aſcertained, though not aſcertained at the time of the action brought. *Doug.* 6. *Walker v. Witter.* It is not neceſſary that the plaintiff in debt ſhould recover the exact ſum demanded; *ſame caſe and page.* 2 *W. Bl. Rep.* 1221, *Aylett v. Love.* If ſo, then a demand of the charges of proteſt on a proteſted bill of exchange particularly deſcribed in the declaration, is good, becauſe the ſum or amount of thoſe charges is capable of being aſcertained by the proteſt without further evidence.

It is admitted that the amount of damages or intereſt need not be ſtated in the declaration.

To aſcertain the amount of intereſt, reference muſt be had to the proteſt, to find its date, from which time the intereſt begins to accrue; a reference to the ſame proteſt will aſcertain the amount of charges.

2d. But if the charges of proteſt are not demanded with ſufficient certainty, yet the judgment ought not to be reverſed on that account; becauſe the judgment is not rendered for the charges of proteſt, but is rendered for £.300 ſterling, the principal of the bill. It is now well ſettled that in an action of debt, judgment may be rendered for leſs than is demanded in the declaration. *Doug.* 6. *Walker v. Witter.* 1 *H. Blackſtone*, 249, *M'Quillin v. Cox.*

In the preſent caſe the demand is for the principal ſum drawn for by the bill of exchange, with damages, intereſt and charges of proteſt thereon. It appears by the record and by the evidence produced by the plaintiffs in error, which is made a part of the record, that a part only of the original demand on the bill was due, the reſidue having been ſettled and paid. Shall the judgment then be reverſed for not ſtating the amount of the charges of proteſt, which had been previouſly paid, and for which the judgment was not rendered?

No other action can be brought by Lenox and Maitland againſt Wilſon for the charges of proteſt on the bill of exchange, ſtated in the declaration; no judgment has been rendered for them in the preſent action. How then has he been injured, or how can he be injured by the omiſſion to ſtate the amount of the charges in the declaration?

In the declaration four diſtinct things are demanded, viz. 1, the principal; 2, the damages on the proteſt; 3, the intereſt; 4, the charges of proteſt.

I take it to be ſettled law, that if a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for ſo much as is well alleged, eſpecially if it be not of an entire demand.

An action of debt might be brought for the principal ſum due on a bill of exchange, without including the damages, intereſt and charges of proteſt. If then an action of debt be brought for the principal, damages, intereſt and charges of proteſt, and the damages, intereſt and charges of proteſt, or either of them, ſhould not be demanded with ſufficient certainty, it would not be error to render judgment for that which was ſufficiently alleged.

In this caſe the principal ſum is demanded with ſufficient certainty, and for the principal ſum only is the judgment rendered. *Cro. Jac.* 104. *Woody's caſe.* 4 *Bac. ab.* 25, 26.

WILSON v. LENOX & AL.

A man ſhall not reverſe a judgment for error, if he cannot ſhew that the error is to his diſadvantage. 5 *Co.* 39. *(b.) Tey's caſe.* It appears by the record that judgment was not rendered for the charges of proteſt, therefore the plaintiff in error has ſuſtained no damage or injury by reaſon of not alleging in the declaration the amount of the charges of proteſt.

3d. If the omiſſion of the amount of the charges of proteſt could in any ſtage of the proceedings be conſidered as an error, it is cured by the verdict. By the act of aſſembly of Virginia, *(rev. code, p.* 118.*)* it is declared that after a verdict of twelve men, no judgment ſhall be ſtayed or reverſed, for any *miſpleading* or *inſufficient* pleading. The omiſſion, if it is an error, muſt be one or the other. In *Jacob's Law Dict.* it is ſaid to be miſpleading if any thing be omitted that is eſſential to the action or defence.

The title to recover in the action is the proteſted bill of exchange; that is ſet forth in the declaration. The title, therefore, is not wholly defective in itſelf, though it may be ſet forth defectively in not ſtating the amount of the charges of proteſt: ſo that it comes within the rule in the caſe of *Ruſhton v. Aſpinall, and* 1 *Call,* 98, *Vaſs v. Chicheſter.*

The court is not bound to enquire into errors, if the party does not ſhew them. 2 *Bac. ab.* 217.

E. J. Lee, in reply.

The caſe of *Walker v. Witter in Doug.* 6, does not ſay that the ſum *demanded* may be uncertain, but only that you may recover a *leſs* ſum than that demanded. The demand muſt be certainly expreſſed, if it be poſſible, at the time of bringing the action.

In the caſes of *Scott's exr. v. Call,* 1 *Waſh.* 115, and *Skipwith v. Baird,* 2 *Waſh.* 165, the amount of the charges of proteſt are particularly mentioned; in one they were 4/6, in the other 7/8.

Feb. 26. *The Chief Juſtice* delivered the opinion of the court.

WILSON v. LENOX & AL.

In this caſe there was an objection taken to the plaintiffs' declaration, which was in debt on a proteſted bill of exchange. The declaration claims £ 300 ſterling, with damages, intereſt and *charges of proteſt*, on a proteſted bill of exchange, without ſtating, in any part of it, the amount of thoſe charges. The verdict is for the debt in the declaration mentioned, on which judgment is rendered, to be diſcharged by a leſs ſum.

The objection is, that the demand is uncertain, in as much as the amount of the charges of proteſt, which conſtitute a part of the debt claimed, is not ſtated.

The clauſe of the act on which this ſuit is inſtituted is in theſe words, "It ſhall be lawful for any perſon or "perſons," &c. "to proſecute an action of *debt*, for *prin-* "*cipal*, *damages*, *intereſt*, and *charges of proteſt* againſt the "drawers," &c. The charges of proteſt conſtitute an eſſential part of the debt, and the declaration would not purſue the act, if thoſe charges ſhould be omitted. This part therefore cannot be conſidered as ſurpluſſage. It is a component part of the debt for which the action is given. Being a neceſſary part, its amount ought to be ſtated with as much certainty as the amount of the bill.

As this is a mere technical objection, the court would diſregard it, if it was not a principle, deemed eſſential in the action of debt, that the declaration ſhould ſtate the demand with certainty.

The caſes cited by the counſel for the defendant in error, do not come up to this caſe. They relate to different debts; this to a ſingle debt compoſed of different parts.

Judgment reverſed and arreſted.

See the caſe of Rudder v. Price, 1 *H. Bl. reports*, 550.

CLARKE v. BAZADONE.

CLARKE *v.* BAZADONE.

A writ of error does not lie from the supreme court of the U. States to the general court for the Territory north-west of the Ohio.

THIS was a writ of error issued from this court to the general court for the territory north-west of the river Ohio, to reverse a judgment rendered in that court against Clarke, the plaintiff in error, in favor of Bazadone, on a foreign attachment for 12,200 dollars damages, and 95 dollars, and 30 cents costs.

The general court of the North-western Territory was established by the ordinance of the old congress, under the confederation, and the principal question was, whether a writ of error would lay from this court to the general court of that Territory.

There was no appearance for the defendant in error.

Mason, for plaintiff in error, contended,

1st. That this court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a *supreme* court, independent of any express provisions of the constitution or laws of the United States.

2d. That this court has the power under the constitution of the United States.

1st. It is a general principle that the proceedings of an inferior tribunal are to be corrected by the superior, unless the latter is expressly restrained from exercising such a control. This is a principle of the laws of that country from which we derive most of our principles of jurisprudence, and is so intimately connected with them that it is difficult to separate them.

In the Saxon times, the Wittenagemote was the supreme court, and had the general superintendance.

But in the time of William the conqueror, the aula regis was established as the sovereign court of the king-

dom; and to that court devolved all the former judicial power of the Wittenagemote; the power of superintending the other courts was derived from the principle of ſupremacy. 1 *Crompton's practice*, 3, 5, 12, 21, 22, 26, 27, 28. 1 *Bac. ab.* 553. 2 *Bac. ab.* 187. A writ of error is a commiſſion to judges of a ſuperior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on ſuch examination to reverſe or affirm the ſame, according to law.

2. *Bac. ab.* 213. The court of king's bench ſuperintends the proceedings of all other inferior courts, and by the plenitude of its power, corrects the errors of thoſe courts; hence it is that a writ of error lies in that court, of a judgment given in the king's bench in Ireland. And upon a judgment in Calais, when under the ſubjection of the king of England, a writ of error lay in the king's bench, 4 *Inſt.* 282. A writ of error would have laid to the king's bench from theſe colonies, before the revolution, but for the particular proviſions of charters, &c. 2 *Bac ab.* 194. Wherever a new juriſdiction is erected by act of parliament, and the court acts as a court of record, according to the courſe of the common law, a writ of error lies on their judgments.

The power is inherent in every ſuperior court, to reviſe the judgments of its inferior.

2d. By the conſtitution of the United States, art. 3, ſec. 1, 2, the judicial power is veſted in one *ſupreme* court and ſuch inferior courts as congreſs ſhall, from time to time, ordain and eſtabliſh; and ſhall extend to all caſes ariſing under the conſtitution, and laws of the United States, and to controverſies in which the United States ſhall be a party. And the ſupreme court is to have *appellate* juriſdiction in all theſe caſes, with ſuch exceptions and under ſuch regulations as congreſs ſhall make. Congreſs has made no exception of the preſent caſe; and no regulation of congreſs was neceſſary to give this court the appellate power. It derives it from the conſtitution itſelf.

This is a caſe ariſing under the laws of the United States.

CLARKE v. BAZADONE.

The very exiſtence of the court whoſe judgment is complained of, is derived from the United States. The laws adopted for the North-weſtern Territory derive their whole obligatory effect from the ordinance of the old congreſs, and are in fact, laws of the United States, although copied from ſtate laws. All power and authority exerciſed in that territory have emanated from the United States; and all offences there committed are againſt the authority of the United States.

If then this is a caſe by the conſtitution cognizable by the judicial authority of the United States; if by the conſtitution, this court has appellate juriſdiction in *all* ſuch caſes, and if this caſe is not within any exception made by the conſtitution or by any act of congreſs, nothing is wanting but to deviſe a mode to bring the cauſe before this court. The writ of error is the common and well known proceſs in like caſes, and by the fourteenth ſection of the judiciary act of 1789, every court of the United States is expreſsly authorized "to iſſue writs of *ſcire facias*, "*habeas corpus*, and *all other writs* not ſpecially provided "for by ſtatute, *which may be neceſſary for the exerciſe of* "*their reſpective juriſdictions*, and agreeable to the princi- "ples and uſages of law." If then the court has juriſdiction, no difficulty can occur as to a mode of exerciſing it.

The court quaſhed the writ of error,

On the ground that the act of congreſs had not authorized an appeal or writ of error, from the general court of the North-weſtern Territory, and therefore, although from the manifeſt errors on the face of the record, they felt every diſpoſition to ſupport the writ of error, they were of opinion they could not take cognizance of the caſe.

HOOE AND CO. *v.* GROVERMAN.

HOOE & CO. v. GROVERMAN.

ERROR from the circuit court of the diſtrict of Columbia, in an action of covenant by Groverman, owner of the brig Nancy, againſt Hooe and co.

the freighters, for demurrage, at the port of Falmouth, in England, from the 19th of June to the 11th of September, 1798, at the rate of £.6 6 0 ſterling per diem. HOOE & co. v. GROVERMAN.

The declaration alleged the breach of the covenant in not paying the demurrage, and the cauſe went to trial in the court below, upon the iſſue of covenants performed. The jury found the following ſpecial verdict, viz.

"We, of the jury, find that the defendants and plain-
"tiff made and executed the charter-party hereunto an-
"nexed, in theſe words, to wit: "This charter-party
"indented," &c. "witneſſeth that the ſaid Groverman
"hath granted, and to freight letten to the ſaid R. T.
"Hooe and company the brig, whereof he is owner,
"called the Nancy, commanded by James Davidſon, a
"citizen of the United States aforeſaid, now lying in
"the port of Alexandria, of the burthen of 197 tons or
"thereabouts; and for and in conſideration of the cove-
"nants herein after mentioned, doth grant, and to freighe
"let unto the ſaid R. T. Hooe and co. the whole *tonnage* of
"the aforeſaid veſſel, called the Nancy, from the port of
"Alexandria in Virginia, to the port of Havre de Grace
"in France, and back to the ſaid port of Alexandria;
"in a voyage *to be made by the ſaid R. T. Hooe and co.* with
"the ſaid brigantine, in manner after mentioned, that is
"to ſay; to ſail, with the firſt fair wind and weather
"that ſhall happen after ſhe is fully and completely laden,
"from the ſaid port of Alexandria, with a cargo of to-
"bacco, to be ſhipped by the ſaid R. T. Hooe and co.
"to the ſaid port of Havre de Grace; and there deliver
"ſaid cargo to Meſſrs. Andrews and co. of that town,
"merchants, or to their aſſigns, in good order, the dan-
"ger of the ſeas only excepted. And at the ſaid port of
"Havre de Grace to take on board a full freight or lading
"of ſuch goods as the ſaid Andrews and co. may think
"proper to put on board ſaid brig, as a return cargo;
"with which ſaid veſſel is to make the beſt of her way
"directly back to the port of Alexandria, and there ſafe-
"ly deliver ſuch cargo, the danger of the ſeas only ex-
"cepted, to the ſaid R. T. Hooe and co. And the ſaid
"Groverman doth *further* covenant and agree to and with
"the ſaid R. T. Hooe and co. their executors, &c. that
"the ſaid brig now is, and at all times during the ſaid

Hooe & co. v. Groverman.

" voyage ſhall be, to the beſt endeavours of him the ſaid " Groverman, and at his own proper coſt and charges, in " all things made and kept tight, ſtiff, ſtaunch, ſtrong, " and well apparelled, furniſhed and well provided, as " well with men and mariners ſufficient and able to ſail, " guide and govern the ſaid veſſel, as with all manner of " rigging, boats, tackle and apparel, furniture, provi- " ſions and appurtenances fitting and neceſſary for the " voyage aforeſaid. And the ſaid Groverman doth further " covenant and agree to and with the ſaid R. T. Hooe " and co. that he will allow them twenty-five running " days from the date hereof for the lading on board the " ſaid veſſel, the aforeſaid cargo of tobacco at the port of " Alexandria; ten working days for diſcharging ſaid car- " go at the port of Havre de Grace, to be computed from " the day after ſhe comes to her moorings at the ſaid port; " and twenty days more after the ſaid ten days run out, " for lading on board the aforeſaid return cargo; alſo ten " working days after ſaid veſſel arrives back and is per- " mitted to an entry at the cuſtom houſe at Alexandria " for receiving her inward cargo, which is to be delivered " at the wharves of ſaid R. T. Hooe and co.

" In conſideration whereof the ſaid R. T. Hooe and co. " doth covenant, promiſe and grant to and with the ſaid " W. Groverman, his executors &c. by theſe preſents; " that they, the ſaid R. T. Hooe and co. or their con- " ſignee, ſhall and will pay to the ſaid W. Groverman, or " his aſſigns, at the port of Havre de Grace, the ſum of " 21,000 livres tournois, in hard money, on diſcharge of " the cargo of tobacco aforeſaid; alſo 7,200 livres, in " hard money, on ſhipment of the return cargo aforeſaid, " and further, that they, the ſaid R. T. Hooe and co. " ſhall and will pay, or cauſe to be paid, to him the ſaid " W. Groverman, or his aſſigns, the ſum of £8. 8. 0. " current money of Virginia, day by day, and for every " day's demurrage, if any there ſhould be by default of " them the ſaid R. T. Hooe and co. at the port of Alex- " andria. And the ſum of 150 livres, in hard money, day " by day, and for every day's demurrage, if any there " ſhould be by default of them the ſaid R. T. Hooe and " co. or their aſſignee, at the port of Havre de Grace. And " the ſaid R. T. Hooe and co. doth further covenant to " and with the ſaid W. Groverman, and the aforeſaid

" James Davidſon, commander of the brigantine aforeſaid, that Andrews and co. their conſignee aforeſaid, ſhall pay to the ſaid captain, for his primage, five per cent. upon the outward and inward freights at Havre de Grace and before his departure therefrom. For the true and faithful performance of the covenants in this charter party, the parties bind themſelves, each to the other, in the penal ſum of £3000, current money of Virginia, to be recovered by the party obſerving, againſt the party failing to perform, the ſame. In witneſs whereof, we have hereunto interchangeably ſet our hands and affixed our ſeals, this tenth day of April, 1798."

" W. GROVERMAN, Seal.
" R. T. HOOE & Co. Seal."

" And the proviſional articles in theſe words, to wit,

" The following proviſional articles are concluded upon, made and agreed to by and between William Groverman, owner of the brigantine Nancy, commanded by James Davidſon, and R. T. Hooe and co. ſince entering into the charter party hereto annexed.

" 1. The captain, or commander, ſhall be inſtructed *by his owner*, previous to his ſailing from the port of Alexandria, *to touch at Falmouth* in ſuch manner as to appear to his crew that there was a neceſſity for his ſo doing, *there to lay off and on twenty-four hours, or longer if deſired, in day light, during which* time there will come off orders from Mr. Fox the American conſul, Mr. Thomas Wilſon, of London, or Meſſrs. Andrews and co. of Havre de Grace. 2. On receiving theſe orders, the captain, or commander, muſt proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of theſe ports deliver his cargo, to ſuch perſon or perſons as the aforeſaid orders may direct. 3. If the veſſel arrives at any other of the aforeſaid ports than Havre de Grace, the time of diſcharging the outward cargo, taking in her inward cargo, demurrage, if any there ſhould be, her outward and inward freight, primage &c. ſhall be the ſame as if ſhe had arrived at and diſcharged at Havre

HOOE & co. v. GROVERMAN.

" de Grace. 4. The outward freight ſhall be conſidered " as £875 ſterling; the inward freight £300 ſterling, " primage five per cent. on the freights and the demur- " rage £6. 6. 0. ſterling, per day. And if the veſſel diſ- " charges in London, the payments ſhall be made in ſter- " ling caſh; if at any other port, in good bills of exchange " at 60 days on London, without diminution of the above " ſums, except ſo much as the captain may be authorized " to receive for his port charges and diſburſements. " 5. *If the veſſel is detained over 24 hours at Falmouth, de-* " *murrage ſhall be paid for the time at the rate ſtipulated in* " *the charter party.* 6. Theſe articles ſhall not be made " known to any perſon whatever, except the captain and " chief mate. The veſſel ſhall be cleared out for Havre de " Grace only, and furniſhed with a role d'equipage, and " all other papers whatever that may be neceſſary at this " cuſtom houſe. No letters whatever ſhall be received " on board except ſuch as the ſaid R. T. Hooe and co. " puts into the poſſeſſion and care of the captain.

" 7. The charter party firſt entered into, the copy of " which is hereunto annexed, ſhall be in force and con- " ſidered as the only contract between the parties for this " voyage, and go unconnected with theſe articles to Havre " de Grace, and there and from thence govern, unleſs in " the caſe of the veſſel being from Falmouth ordered to a " different port; then, and in that caſe, the charter party " ſhall only be conſidered as the great outlines of the bar- " gain between the parties, to be poſitively governed by " theſe articles; but the 4th article to be in force as to " payments at any place.

" In teſtimony whereof, we have hereunto ſet our " hands and affixed our ſeals, this 11th day of April, " 1798.

" WILLIAM GROVERMAN, (Seal.)
" R. T. HOOE & co." (Seal.)

" We find that James Davidſon, maſter of the brigan- " tine Nancy, in the ſaid charter party and proviſional ar- " ticles mentioned, on the morning before the departure " of ſaid veſſel from the port of Alexandria, ſigned an " acknowledgment written on ſaid proviſional articles " in theſe words, to wit, " I do acknowledge that I am

" to act agreeably to the foregoing provisional articles, " notwithstanding the charter party to Havre de Grace.

" JAMES DAVIDSON."

" We find that the said James Davidson, before he " sailed from Alexandria on the voyage in the said pro- " visional articles mentioned, was told by R. T. Hooe, " one of the defendants and freighters of said vessel, that " on his arrival off Falmouth, a town in England, he would " receive instructions from Mr. Fox, the American consul, " and that he must abide by such instructions. We find " that on the twentieth of June, 1798, the said vessel ar- " rived in Falmouth roads, about three leagues from the " port of Falmouth, and the said James Davidson, the " master thereof, laid the vessel to, off Falmouth, and im- " mediately proceeded in a pilot boat to Falmouth, went " on shore and applied to the said Fox, the American " consul, for orders where to proceed with the said brig- " antine and cargo. The said Fox told the said Davidson " that he had not received any orders for him, and that " therefore he must bring the brigantine Nancy into the " port of Falmouth, and there remain with the said brig- " antine and her cargo, until orders were received for him " to proceed to his port of discharge. Upon receiving " which answer and orders from the said Fox, the said " Davidson, in conformity thereto, returned on board his " said vessel with a pilot employed by said Fox for the " purpose of conducting said vessel into the port of Fal- " mouth; and on the same day the said Davidson brought " said vessel to an anchor in the port of Falmouth afore- " said. We find that the said Fox informed the said " Davidson, that he must wait with said vessel at anchor " in the port of Falmouth, until the said Fox could pro- " cure orders for him from Thomas Wilson of London; " which said Fox and Wilson are the same persons men- " tioned and named in the aforesaid provisional articles. " We find that on the 21st. day of June 1798, the said " James Davidson again went on shore and reported his " said vessel, and delivered his papers to the collector of " the customs for the port of Falmouth aforesaid, which " papers the said collector refused to return, saying that " he suspected the cargo on board said vessel was French " property, and on the same day caused the said vessel to " be seized. We find that on the 23d day of the said month " of June, the said Davidson received orders from the said

HOOE & CO. v. GROVERMAN.

"Thomas Wilſon, through the ſaid Fox, to proceed with "the ſaid veſſel and cargo to the Downs, and thence to "London. We find that the ſaid veſſel was detained in "the port of Falmouth aforeſaid from the ſaid 21ſt day of "June, 1798, until the 11th of September following, in "conſequence of the ſeizure aforeſaid. We find that "on the ſaid 11th day of September the ſaid veſſel pro-"ceded from the port of Falmouth to the Downs by the "aforeſaid order of the aforeſaid Thomas Wilſon. We "find that the ſaid Brigantine and cargo were the *bona* "*fide* property of American citizens alone; we find "that by an act of parliament of Great Britain, paſſed on "the 29th year of George 3d. ch. 68. §. 12, and in "force at the time the ſaid Brigantine arrived off Fal-"mouth as aforeſaid, it is enacted and provided in the "following words, to wit;" "And be it further enact-"ed &c." "And by the 30th ſection of the ſaid act, "it is enacted and provided in the following words to "wit," "Provided always," &c. "We find that the "ſaid Fox urged the danger ariſing under the ſaid act as "a reaſon why the ſaid veſſel ſhould be brought to anchor "in the port of Falmouth, there to wait for the orders "of the ſaid Thomas Wilſon of London, and why the "ſaid veſſel ſhould not lay off Falmouth without the li-"mits of the ſaid port. We find that the ſaid veſſel "was, on the ſaid 20th of June, laden in part with "240,000 pounds of tobacco of the growth of the "United States. We find that the ſaid Davidſon, at "Falmouth aforeſaid, made and entered a proteſt in theſe "words, manner and form following, to wit, "To all "people," &c.

"We find that it was by the default of the defend-"ants or their agents, in failing to have orders ready on "the arrival of the ſaid veſſel off Falmouth as aforeſaid, "deſignating and directing to which of the ports of diſ-"charge mentioned in the ſecond article of the provi-"ſional articles aforeſaid, the ſaid veſſel was to proceed, "and by the orders given to the ſaid Davidſon by the "ſaid Mr. Fox, that the ſaid Davidſon did bring the "ſaid veſſel to anchor in the ſaid port of Falmouth, and "that the ſaid veſſel and cargo were ſubjected to the ſeiz-"ure and detention aforeſaid. If the law be for the plain-"tiff we find for the plaintiff £794. 19. 9. Virginia

"currency, damages; If the law be for the defendants, "we find for the defendants."

The court below being of opinion that the law was for the plaintiff, judgment was entered accordingly; and the defendants ſued out the preſent writ of error.

Swann and Simms for plaintiffs in error.

C. Lee and E. J. Lee for defendant.

Simms. Inthis caſe it is material to aſcertain whether *Hooe and co.* ought to be conſidered as the owners of the veſſel, and the captain as *their* agent, for the voyage; or whether *Groverman* is to be conſidered as the owner, and the captain as *his* agent.

Whether the freighter or owner of a ſhip, is to be conſidered as the owner for the voyage, depends upon the nature of the contract between them. If the freighter hires and employs the maſter, and the maſter is ſubject to his orders and direction during the voyage, then the frieghter is conſidered as the owner for the voyage; but if the owner hires and employs the captain and hands, then *he* is the owner for the voyage, and liable for their miſconduct. This fully appears from the caſe of *Vallejo v. Wheeler. Cowp.* 143.

In the preſent caſe, Groverman was to employ and pay the maſter and the mariners. *He* covenants that they ſhall perform a ſpecific voyage; that the veſſel ſhall ſail with the firſt fair wind after ſhe is fully laden; that the cargo ſhall be delivered in good order, the danger of the ſeas only excepted; that the veſſel was at the time of making the charter party, and ſhould continue during the voyage, at his expenſe, tight, ſtaunch and well found. The captain and crew, therefore, muſt have been ſubject to the control of Groverman during the voyage, and he was liable for their miſconduct, and if any loſs happened thereby, he, and not the freighters, was to bear it.

Indeed, it is expreſsly ſtipulated that the owners ſhall give inſtructions to the captain to touch at Falmouth,

Hooe & co. v. Groverman.

there to lay off and on 24 hours or longer if desired, in day light, for orders from Mr. Fox, Mr. Wilson or Messrs. Andrews and co. and that on the receipt of such orders, he should proceed to the port directed by those orders.

If the captain has disobeyed his instructions from his owner and employer, the freighters surely can not be liable. Groverman must look to his agent, the captain, for redress. It is probable, however, that the captain did the best he could for the interest of all concerned; and there is no more reason that the owner should look to the freighters for indemnification for the detention of his ship, than there is for the freighters looking to the owner for indemnification for the detention of their goods. If the captain deviated from his instructions, it was at his and his employers' risk.

But the captain was bound by the provisional articles to carry the vessel into Falmouth. She was there in the regular course of her voyage, and, by the articles, Hooe and co. had a right to detain her there upon payment of the stipulated sum for demurrage. Being then in the regular course of the voyage, the detention by a foreign power gives no right to claim demurrage, for the time she was in the hands of the British government under the seizure. The remedy of Groverman was against his insurers, and not against the freighters. If he has not insured, it was his own fault and he must stand his own insurer. *Park on insurance*, 87, 88, 89. 2 *Burr.* 696, *Goss v. Withers*. If the owner could recover demurrage from the freighters on the detention by a foreign government, that detention might continue so long that the stipulated demurrage might amount to twice the value of the ship and cargo. He had a right to abandon to the underwriters; but the freighters can never be presumed to have become insurers. Hooe and co. contracted to pay demurrage for such detention only as should happen through their default; but here the detention was by the British government. The court below have therefore erred in giving judgment for the plaintiff on the special verdict for the whole demurrage, from 21st June to 11th of September, 1798. The vessel was seized before the expiration of the twenty-four hours, which were allowed by

the agreement. Hooe and co. therefore, were not liable to pay any demurrage at all. Or if it ſhall be conſidered that Hooe and co. were liable for demurrage after the veſſel had been twenty-four hours at Falmouth, until orders were received from Thomas Wilſon, they could be bound to pay only for two days, becauſe it is found that the captain received his orders to ſail for London on the 23d of June. If Hooe and co. were liable for thoſe two days' demurrage, and no more, the court below ought to have awarded a *venire facias de novo.*

But if Hooe and co. had not a right to order the brig to Falmouth, yet Groverman has not a right to recover the damages he may have ſuſtained thereby, in the preſent action, but his remedy was by a ſpecial action on the caſe. An action of covenant can only be maintained for not doing an act covenanted to be done, or for doing an act covenanted not be done. There was no covenant on the part of Hooe and co. that the veſſel ſhould not go into the port of Falmouth; and if there was, yet the plaintiff in his declaration does not aver ſuch a covenant, or declare on the breach of it. The only breach aſſigned is the non-payment of demurrage. If the veſſel had no right to go into the port of Falmouth, then her going in is not a caſe provided for by the contract, and conſequently the contract can form no rule for aſcertaining the damages.

If the veſſel had a right to go into Falmouth, then the conſequent ſeizure is not chargeable to Hooe and co. If ſhe had not a right to go in, then no damages can be recovered in the preſent form of action; nor in any other, becauſe the act complained of, is Groverman's own act, or the act of his agent, the captain, for whoſe conduct Groverman himſelf is reſponſible.

It is true the jury have found that it was by the default of Hooe and co. in not having orders ready at Falmouth, that the veſſel was obliged to go into the port, and that the ſeizure and detention took place. But if this is a breach of any one of the covenants, yet it is the breach of a covenant not declared upon, nor is the breach aſſigned, and therefore no damages can be given in this action, for the breach of that covenant.

HOOE & CO. v. GROVERMAN.

E. J. Lee, for defendant in error.

Hooe and co. were owners for the voyage. The captain was bound to obey their orders. Fox and Wilson were their agents. They, by their agent, ordered the veſſel into port, contrary to the terms of their agreement; the detention was the conſequence of their miſconduct and they ought to be liable for demurrage.

If a perſon hires a chattel, the hirer is the owner for the time for which he has hired it. *Cowp.* 143, *Vallejo v. Wheeler*. In that caſe, p. 147, it is ſaid, that "there "ſeems to be great reaſon for a diſtinction between a "*general* ſhip, and one that is *let to freight to a ſingle* perſon "only. The former carries the goods of all mankind; "every man that chuſes it, is at liberty to load his goods "aboard her; and the merchant who ſhips his goods in "ſuch a veſſel, has no command over her. He does not "hire or employ the maſter; neither is the maſter ſubject "to his order or direction during the voyage. But in the "caſe of a veſſel *let to freight to one merchant only*, and by "him alone freighted, he may be ſuppoſed to employ the "maſter, and have the direction of the veſſel and the voy-"age; *and therefore whatever is done by the captain is to be* "*conſidered as done by the merchant's ſervant*." The captain, therefore, in taking the veſſel *into* the port, when by the agreement he was only to lay *off and on*, acted as the ſervant of Hooe and co. and by their orders expreſsly given through their agent Mr. Fox.

But if Hooe and co. were not owners *pro hac vice*, yet having been the cauſe of the veſſel's going into port, whereby ſhe was ſeized, they are liable.

It is ſaid in *Molloy*, 375, (257,) *Book*, 2, *ch.* 4. §. 9, that "if the ſhip, by reaſon of *any fault ariſing from the* "*freighter*, as lading aboard prohibited or unlawful com-"modities, occaſions a detention, or otherwiſe impedes "the ſhip's voyage, he ſhall anſwer the freight contracted "and agreed for."

It is immaterial what was the immediate cauſe of the detention, if it happened by the fault of Hooe and co. here is a poſitive covenant to pay demurrage if the veſſel is detained.

But it is said, we have not brought our action for damages for carrying the vessel into port. It is true that we have not; and the reason is that the parties themselves having by covenant fixed the rate of damages, no action but covenant would lay.

The furnishing the vessel with men, furniture, &c. does not make Groverman the owner. The captain signed the provisional articles by which he bound himself to obey the orders of Fox and others, the agents of Hooe and co. and whether the captain was the agent of Groverman or not, still Hooe and co. have rendered themselves liable by ordering him to go into the port.

C. Lee, on the same side.

It is of no importance who was the owner; for the detention is clearly the consequence of the default of Hooe and co. The action is brought for not paying demurrage according to express covenant. The defence set up is, that the vessel was improperly carried into the port; and that the captain being the agent of Groverman, he must abide the loss. We admit that it was unlawful for the vessel to go *into* the port; this is the ground of our right. Suppose the captain was the agent of Groverman, and Fox the agent of Hooe and co. By whose fault or orders was the vessel carried in? Clearly by the orders of Hooe and co. No man has a right to order my servant; but if he does, and by that means misleads him, and a loss happens, he must be liable. Hooe gave instructions to the master how to act. If it was lawful for him to do so, then he must be considered as the owner, and the obedience to his orders, in all its consequences, is chargeable to him.

If it was *not* lawful, then his improper interference, if it mislead the master, is also chargeable to him. Unless he was the owner he had no right to instruct the captain; it was a wrongful act. If he was the owner, there is no pretence for not paying the demurrage.

If it should be said that the act of parliament, referred to in the special verdict, and which is generally called

HOOE & CO. v. GROVERMAN.

the *lowering act*, justified the orders to carry the vessel into port, the answer is, that the parties must be supposed to have understood that business, and agreed to the risk.

The finding of the jury respecting the orders not being ready, although it is apparently in favour of the defendant in error, is not considered as materially affecting the case, because, by the agreement, Hooe and co. were not bound to have the orders ready, but might keep the vessel waiting, upon paying the stipulated demurrage.

Swann for plaintiffs in error.

The questions which seem to arise in this case are these,

1. Are Hooe and co. liable at all for this detention?

2. If they are at all liable, are they liable in this form of action?

1st. The vessel had a right to go *into* the port of Falmouth, and was therefore in the regular course of her voyage.

If so, then the seizure and detention of the vessel by the British government was not by the default of Hooe and co. and the case is not within the contract.

Hooe and co. were not bound absolutely to have the orders ready on the arrival of the vessel at Falmouth; but the contract provides for the case of the orders not being ready, and Hooe and co. were at liberty to detain the vessel at Falmouth for orders, on paying a stipulated sum for demurrage. The words of the 5th provisional article are, that "if the vessel is detained over 24 hours *at* Fal-"mouth, demurrage shall be paid at the rate stipulated "in the charter party." The parties are presumed to know the course of trade in the voyage about which they were contracting. *Coup.* 605, *Bond v. Nutt.* They must have known that the vessel could not lawfully lay off and on more than 24 hours without being liable to seizure under the act of parliament. This created a necessity for the vessel's going into port. Not indeed a physical necessity; *that* was not requisite to justify it. It was

ſufficient if in *prudence* and *diſcretion* it was neceſſary and adviſable for the general benefit of all parties concerned. *Cowp.* 601, *Bond v. Nutt. Park* 310. *Burns M. In.* 103, 133. The words, "*at Falmouth*," ſtrongly indicate this to have been the underſtanding of the parties themſelves; and the very action itſelf, founded upon the contract, for demurrage *at* the port of Falmouth, is a direct affirmance of the right to go into the port. If the veſſel had *no* right to go into the port, then *demurrage* can not be claimed under the contract, becauſe it is a caſe not provided for *by* the contract. If the veſſel *had* a right to go into the port, then ſhe was ſtill in the regular proſecution of her voyage at the time when ſhe was ſeized by the Britiſh government, and conſequently the detention can not be chargeable to Hooe and co. They have covenanted only againſt their own default and their own acts. Groverman had other means of ſecuring himſelf againſt all other riſks. He ought to have inſured; if he has not, it is his own fault; he ſtands as his own inſurer, and his remedy is by recourſe to the Britiſh government. Suppoſe the veſſel had been ſeized at Havre de Grace by the French government: Can it be ſuppoſed that Hooe and co. would have been liable? It will not be contended that they would; and yet there is in fact no difference between the two caſes.

Hooe and co. can not be conſidered as the owners, becauſe, in the firſt place, the hiring of the veſſel was not general, it is of the *tonnage* only; this excludes the cabin and the captain's perquiſites. Groverman employs the maſter and crew, and ſtipulates for the good condition of the veſſel during the voyage, and for the ſafe transportation of the goods, the danger of the ſeas only excepted; thereby clearly making himſelf reſponſible for the fidelity and good conduct of the maſter and mariners. Groverman was therefore clearly the owner of the veſſel for the voyage. *He* covenants to inſtruct the captain to touch at Falmouth and wait for orders. *He* covenants that the captain ſhall proceed to ſuch port as ſhall be mentioned in thoſe orders. Now he never would have done all this if the captain was not ſubject to his control. If then the captain was the ſervant of Groverman, and has improperly carried the veſſel into port, inſtead of laying off and on, how can Hooe and co. be liable

HOOE & co. v. GROVERMAN.

for the conſequences. It is ſaid, becauſe Fox adviſed or directed it; and Fox was the agent of Hooe and co.

Then it amounts to this, that Groverman, by his agent the captain, and Hooe and co. by their agent, Mr. Fox, finding the veſſel to be in danger by laying off and on, have conſulted together as to the beſt means of preventing loſs to all parties, and *agreed* that the veſſel ſhould go into the port. To which of the parties is this error, if it is one, to be imputed? Certainly to neither; it was their mutual act, intended for their mutual benefit, and neither has a right to complain, or to make the other liable for the ſubſequent, and perhaps conſequent ſeizure by the Britiſh government.

Fox had no authority to order the veſſel, except as to which of the ports mentioned in the proviſional articles, ſhe ſhould go. The directions to the captain therefore to come into the port, muſt have been conſidered by the captain only as matter of advice. He was not bound to follow it.

Suppoſe I adviſe an act to be done and it turns out unfortunately, am I to be liable for the conſequences? Suppoſe even that the veſſel went in purely to oblige and benefit Hooe and co. yet they would not thereby become liable for accidents happening without their default. If my friend in coming to ſerve me, receives an injury from a third perſon, am I liable?

If the proviſional articles do not provide for the veſſel's going *into* the port, yet Mr. Fox and the captain acted correctly. A caſe aroſe not provided for by expreſs contract; they did right therefore in mutually conſulting for the common good of their employers, and although the reſult of their deliberations may have proved unfortunate, yet neither party can criminate the other.

2. If Hooe and co. are liable at all, it is not in this form of action.

The covenants which they are bound to perform are,

1. To pay the freight.

2. To furniſh orders at Falmouth.

3. To pay ſo much *per diem* for their own detentions.

Now it is admitted, that this detention was by the Britiſh government, and if the veſſel was in her voyage while in the port of Falmouth, there was no default of Hooe and co. by which that detention can be chargeable to them. But if the veſſel was out of her voyage, and had been carried into port by Hooe and co. contrary to the agreement, then it is a caſe not provided for by the charter party, and therefore *demurrage* as ſuch cannot be claimed. In ſuch a caſe the remedy would be only for the tort. Suppoſe they had burnt the veſſel; no action of covenant would lay for that wrong. The injury complained of is the ordering the veſſel into port.

Feb. 23d. *The Chief Juſtice* delivered the opinion of the court.

This is a writ of error to a judgment rendered in the circuit court of the diſtrict of Columbia, ſitting in Alexandria on the following caſe.

A charter party was entered into between the parties on the tenth day of April, 1798, whereby Groverman let to Hooe and co. a veſſel, of which he was owner, for a voyage to Havre de Grace.

The firſt article ſtates the indenture to witneſs, "that "the ſaid Groverman hath granted and to freight letten "to the ſaid R. T. Hooe and co. the brigantine Nancy, "whereof he is owner, commanded by James Davidſon, a "citizen of the United States, now lying in the port of "Alexandria, of the burthen of 197 tons, or thereabouts; "and for and in conſideration of the covenants herein "after mentioned, doth grant and to freight let unto the "ſaid R. T. Hooe and co. their executors and adminiſ-"trators, the whole *tonnage* of the aforeſaid veſſel called "the Nancy, from the port of Alexandria, in Virginia, to "the port of Havre de Grace, in France, and back to the "ſaid port of Alexandria, *in a voyage to be made by the ſaid "R. T. Hooe and co.* with the ſaid brigantine, in manner "herein after mentioned; that is to ſay, to ſail with the

Hooe & co. v. Groverman.

"first fair wind and weather that shall happen after she is "completely laden, from the said port of Alexandria, with "a cargo of tobacco to be shipped by said R. T. Hooe and "co. to the said port of Havre de Grace, and there de-"liver the said cargo to Messrs. Andrews and co. of that "town, merchants, or to their assigns, in good order, the "danger of the seas only excepted; and at the said port "of Havre de Grace to take on board a full freight or "lading of such goods as the said Andrews and co. may "think proper to put on board said brigantine, as a return "cargo, with which the said vessel is to make the best of "her way directly back to the port of Alexandria, and "there safely deliver such cargo to the said R. T. Hooe "and co."

Groverman further covenants with the said R. T. Hooe and co. that the vessel is and shall, during the voyage, be kept in good condition, and furnished with all manner of necessary and proper rigging, &c. and with mariners to navigate her. He further covenants to allow twenty-five running days for lading the vessel at the port of Alexandria, thirty days for discharging her cargo and taking on board the return cargo at Havre, and ten days for receiving her inward cargo at Alexandria.

In consideration of these covenants, R. T. Hooe and co. engage to pay the stipulated freight, and £.8. 8. o. for every day's demurrage, if any there should be by their default at the port of Alexandria; and one hundred and fifty-one livres by the day for every day's demurrage, occasioned by their default at the port of Havre de Grace.

On the 11th day of April provisional articles were entered into between the same parties by which it was stipulated, that,

1st. "The captain or commander shall be instructed "by his owner, previous to his sailing from Alexandria, "to touch at Falmouth in such manner as shall appear "to his crew, that there was a necessity for his so doing, "there to lay off and on twenty-four hours (or longer if "desired) in day light, during which time there will come "off orders from Mr. Fox, the American consul, Mr. "Thomas Wilson of London, or Messrs. Andrews and "co. of Havre de Grace.

2dly. "On receiving these orders the captain or commander must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports deliver his cargo, to such person or persons as the aforesaid orders may direct."

The third and fourth articles apply the covenants of the charter party, respecting the conduct of the vessel in the port of Havre, to the contingency of her being ordered to some other port; and to the freight, and stipulate the demurrage to be £. 6. 6. 0. sterling by the day.

The fifth article is in these words.

5th. "If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time at the rate stipulated in the charter party." On the 20th of June, 1798, the vessel arrived in Falmouth roads about three leagues from the port of Falmouth, where the master laid her to and immediately went on shore, and applied to Mr. Fox, the American consul, for orders where to proceed. Fox replied that he had received no orders for him and that therefore he must bring the vessel into the port of Falmouth, and there remain until orders were received for him to proceed to his port of discharge.

These orders were given to avoid the penalties of the British hovering act, which subjected to forfeiture the vessel and cargo if found in the situation in which the Nancy would have been, if she had waited for orders without entering the port. The captain immediately brought his vessel into port where she was seized on suspicion of being French property, and detained for nearly three months.

After the seizure, on the 23d day of June, the captain received orders from Thomas Wilson, through Fox, to proceed with his vessel to London, there to deliver her cargo.

This suit is brought by Groverman to recover damages against R. T. Hooe and co. for this detention.

The declaration states the charter party and provisional agreement, and then assigns a breach of them in these

HOOE & CO. v. GROVERMAN.

words. "And the ſaid plaintiff doth aver that the ſaid brig "arrived off Falmouth on the 19th day of June, 1798, "when the captain, by the orders of the aforeſaid Mr. "Fox, the agent of the ſaid defendants, conveyed her into "the port of Falmouth, by means whereof the ſaid brig "was detained in the aforeſaid port of Falmouth, more than "twenty-four hours, to wit, from the 20th day of June laſt "aforeſaid, to the 11th day of September in the year 1798, "when ſhe ſailed by the orders of Andrews and co. the "agents for the ſaid defendants, for the Downs." And the declaration then charges that the defendant had not paid the demurrage ſtipulated in the charter party, or in the proviſional articles.

Iſſue was joined on the plea of conditions performed, and the jury found a ſpecial verdict, containing the facts already ſtated, and further, that before the veſſel ſailed from Alexandria the captain was told by R. T. Hooe, that on his arrival off Falmouth he would receive inſtructions from Mr. Fox, the American conſul, and that he muſt abide by ſuch inſtructions; and that it was by the default of the defendants or their agents in failing to have orders ready on the arrival of the ſaid veſſel off Falmouth as aforeſaid, deſignating and directing to which of the ports of diſcharge mentioned in the ſecond article of the proviſional articles aforeſaid, the ſaid veſſel was to proceed, and by the orders given to the ſaid Davidſon, (the maſter) by the ſaid Mr. Fox, that the ſaid Davidſon did bring the ſaid veſſel to anchor in the ſaid port of Falmouth, and that the ſaid veſſel and cargo were ſubjected to the ſeizure and detention aforeſaid; if the law be for the plaintiff the jury find £.794. 19. 9. Virginia currency, damages; if the law be for the defendant, then they find for the defendants.

The circuit court was of opinion the law was for the plaintiff and rendered judgment in his favor.

To ſupport this judgment the ſpecial verdict ought to ſhew that R. T. Hooe and co. the defendants in the circuit court, have broken ſome covenant contained in the agreements between the parties; and that the breaches aſſigned in the declaration are upon the covenant ſo broken.

The breach aſſigned is the non-payment of demurrage ſtipulated to be paid, for a longer detention than twenty-four hours at Falmouth; and it is to be enquired whether the declaration makes a caſe ſhowing demurrage to be demandable, and how far the ſpecial verdict ſuſtains that caſe.

The caſe made by the declaration is,

That on the arrival of the veſſel off Falmouth the captain took her into port by order of Mr. Fox, by means whereof ſhe was detained more than twenty-four hours.

The queſtion ariſing out of this caſe for the conſideration of the court, is,

Does it ſhew a breach of covenant on the part of R. T. Hooe and co. which ſubjects them to demurrage for the detention ſtated?

The fifth article is ſuppoſed to be broken. The words of the covenant are, "if the veſſel is detained over 24 "hours at Falmouth, demurrage ſhall be paid for the "time, at the rate ſtipulated in the charter-party." If this clauſe provides for every detention whatever, however it may be occaſioned, the enquiry is at an end, and the judgment ſhould be affirmed. But on looking into the proviſional articles, the general expreſſions, here uſed, will be found to be explained.

The firſt of theſe articles ſtipulates that the captain ſhould touch at Falmouth, there to lay off and on for twenty-four hours (or longer if deſired) in day light, during which time there will come off orders from Mr. Fox the American conſul, Mr. Thomas Wilſon of London, or Meſſrs. Andrews and co. of Havre de Grace.

Here then is a power given to R. T. Hooe and co. to detain the veſſel longer than twenty-four hours, lying off and on at the port of Falmouth, waiting for orders, and it is the only rational conſtruction which can be given the contract to ſuppoſe that the fifth article refers to the firſt.

HOOE & CO. v. GROVERMAN.

A certain number of days are allowed for lading the veſſel in Alexandria. But more days may be required, in which caſe demurrage is to be paid. So with reſpect to diſcharging and reloading the veſſel at the port of delivery in Europe; and ſo with reſpect to the return cargo in Alexandria: in each caſe demurrage is ſtipulated in the event of a longer detention than is agreed on.

When, then, a time is given to wait for orders at Falmouth, it is reaſonable to ſuppoſe that the demurrage, which is to be paid, for a longer detention than the time given, relates to a detention occaſioned by waiting for orders, or ſome breach of covenant by R. T. Hooe and co.

The declaration does not ſtate the veſſel to have waited, lying off and on, for orders, but to have been taken into port, by the orders of Mr. Fox, when ſhe was ſeized and detained by the officers of the Britiſh government.

The covenant then was broken by taking the veſſel into port, and it is to be enquired who is anſwerable for this breach.

It has been argued that R. T. Hooe and co. are anſwerable for it, becauſe,

1. Their orders for the further proſecution of the voyage ought to have been in readineſs as ſtipulated.

2. The veſſel was taken into port by the orders of their agent, for whoſe acts they are accountable.

3. The captain was, for the voyage, *their* captain; and the ſtipulation to lay off and on, therefore, being broken by him, was broken by them.

To the firſt argument, founded on the non-reception of orders, the obſervation already made may be repeated. The declaration does not attribute the detention to that cauſe, but to a compliance with the orders of Fox in taking the veſſel into port.

If, however, the charge in the declaration had been that orders were not ready on the arrival of the veſſel,

that charge would have been anſwered by the contract itſelf, which allows a delay of twenty-four hours for the reception of orders, without paying demurrage, and a longer time, if required, on paying therefor at the rate of £. 6. 6. 0. ſterling, by the day.

The failure then to have the orders, for the further deſtination of the veſſel, in readineſs on the arrival of the captain, or even within the twenty-four hours after his arrival, was no breach of contract on the part of R. T. Hooe and co. ſince it was an event contemplated and provided for by the parties; and the queſtion whether in the actual caſe which has happened, that is of a delay longer than twenty-four hours in giving the orders, but of a ſeizure before that time elapſed, R. T. Hooe and co. are reſponſible for demurrage accruing between the termination of the twenty-four hours and the receipt of the orders, cannot be made in this caſe, becauſe there is no allegation in the declaration which puts that fact in iſſue.

The court will proceed then to conſider whether,

2dly. R T. Hooe and co. are made accountable for the veſſel's being taken into port, ſince that meaſure was adopted in purſuance of the inſtructions of their agent, Mr. Fox.

The finding of the jury goes far to prove that the defendants in the court below have made themſelves reſponſible for the conduct of Fox. They find that R. T. Hooe informed the captain before he ſailed from Alexandria, that on his arrival off Falmouth, he would receive orders from Mr. Fox, and that he muſt abide by ſuch inſtructions. This finding creates ſome difficulty in the caſe. But this communication from Mr. Hooe to the captain ought to be taken, it is conceived, in connection with the proviſional articles. Thoſe articles explain the nature of the orders to be received, and by which the captain was directed to abide. In them it is expreſsly ſtipulated that on receiving theſe inſtructions, the captain ſhould proceed directly for Havre de Grace, London, Hamburg, Bremen, or Rotterdam, as he ſhould be directed. The orders then which he was to receive and obey, muſt be ſuppoſed compatible with this agreement.

HOOE & CO. v. GROVERMAN.

This conſtruction is the more reaſonable, becauſe, annexed to the proviſional articles, is an acknowledgment on the part of the captain, that he was to act conformably to them. He ought not to have underſtood declarations of the kind ſtated in the verdict, as directing a departure from a written agreement entered into by the owner and freighters of the veſſel, and to which he had bound himſelf to conform.

This article ſeems too to explain the power delegated by Hooe and co. to Fox; and to ſhow that he was their agent for the purpoſe of directing the further deſtination of the veſſel, but for no other purpoſe.

If this be the correct mode of underſtanding this part of the verdict, and it is believed to be ſo, then the particular conduct of Hooe and co. did not authorize the captain to obey the orders of the American conſul in taking the veſſel into port; nor are they reſponſible for the conſequences of that meaſure, unleſs they could be conſidered as reſponſible for a violation of the covenant by the act of the captain.

If theſe facts are to be differently underſtood, and the communication made by Hooe to the captain is to be underſtood as authorizing him to obey any order given by Fox, though that order ſhould be directly repugnant to the proviſional articles, ſtill the liability of Hooe and co. in this ſuit, will depend on the queſtion, whether the covenant to lay off and on at the port of Falmouth, was a covenant on the part of the owner, or of the freighters, of the veſſel. This depends ſo much on the queſtion whether Groverman or R. T. Hooe and co. were owners of the veſſel for the voyage, that it will more properly be conſidered with that point.

3. Was the captain under the direction of Groverman or Hooe and co. for the voyage?

This is to be determined by the whole charter party, and the proviſional articles taken together.

It has been obſerved at the bar, and the obſervation has conſiderable weight, that Groverman lets the *tonnage* of

the veſſel, and not the whole veſſel, to the freighters. The expreſſion of the charter party, it will be perceived, varies in the part deſcriptive of the agreement, from what is uſed in the part conſtituting the written agreement. The indenture witneſſes, "that the ſaid Groverman hath "granted, and to freight letten, to the ſaid R. T. Hooe "and co. *the brigantine Nancy*, whereof he is owner," &c. but immediately proceeds to ſay, "and for and in "conſideration of the covenants herein after mentioned, "doth grant and to freight let to the ſaid R. T. Hooe "and co. the *whole tonnage of the aforeſaid veſſel*, from the "port of Alexandria, in Virginia, to the port of Havre "de Grace, in France," &c. As the latter are the operative words which really conſtitute the contract, it is conceived that they ought to prevail in conſtruing that contract. Groverman, then, has only let to Hooe and co. the *tonnage* of the veſſel, and therefore is the leſs to be conſidered as having relinquiſhed ownerſhip of her during the voyage. There are other circumſtances which ſerve to ſhow that the direction of the veſſel, during the voyage, was intended to remain with Groverman. The cargo is to be delivered to Meſſrs. Andrews and co. of Havre de Grace, in good order, the danger of the ſeas only excepted. This is an undertaking on the part of Groverman, which he certainly would not have made if he had relinquiſhed the direction of the voyage to Hooe and co. If the veſſel, *pro hac vice*, had been their veſſel, Groverman would not have contracted for the delivery of the cargo; and for the delivery to a ſpecified perſon.

Hooe & co. v. Groverman.

If the freighters had owned and commanded the veſſel they might have delivered the cargo in Havre, to any other perſon, or have diſcharged at a port ſhort of Havre, without injury to Groverman. So the cargo taken on board at Havre is to be ſuch as Andrews and co. may think proper; which return cargo is to be delivered to Hooe and co. in Alexandria. Theſe ſtipulations all indicate that the voyage was to be performed under the orders of Groverman, becauſe the acts ſtipulated are to be done by him, and the covenants are his covenants.

This is further evidenced by the ſubſequent language of the charter party. The ſucceeding ſentence begins with the words, "And the ſaid Groverman doth *further*

HOOE & CO. v. GROVERMAN.

" covenant to and with the ſaid R. T. Hooe and co." &c. ſhowing that the preceding covenants were all on the part of Groverman. This *further* covenant is not only for the preſent condition of the veſſel, but that ſhe ſhall be kept well apparelled and well manned by the ſaid Groverman *during the voyage*. The captain, then, was Groverman's captain, the mariners were Groverman's mariners; and this furniſhes an additional reaſon for ſuppoſing the captain and mariners to be under his direction.

After ſome further covenants on the part of Groverman the charter party proceeds thus, " In conſideration " whereof the ſaid R. T. Hooe and co. do covenant, &c. " to and with the ſaid W. Groverman, &c. that they " will well and truly pay the freight ſtipulated therein."

Thus the whole language of the charter party goes to prove that the covenants reſpecting the voyage are on the part of Groverman, and on that account, as well as on the account of his letting only the *tonnage* of the veſſel, and furniſhing the captain and mariners, &c. he is to be conſidered as the owner of the veſſel for the voyage, under the charter party. This opinion is ſtrengthened rather than weakened by the proviſional articles.

The firſt article ſtipulates that particular inſtructions reſpecting the voyage ſhall be given to the captain, by Groverman, before its commencement. The words are, " The captain or commander ſhall be inſtructed by his " owner, previous to his ſailing from the port of Alex- " andria, to touch at Falmouth," " there to lay off and " on twenty-four hours (or longer if deſired) in day light," &c. Theſe orders, then, to the captain were to be given by Groverman, and it was by his authority that the captain was to act on that occaſion. This explains the doubt as to the perſon who was to be conſidered as covenanting that the veſſel ſhould lay off and on, for twenty-four hours, at the port of Falmouth, and tends to ſhow who was reſponſible for the breach of that covenant. This too is in addition to covenants in the charter party which are plainly Groverman's, and is therefore the more to be conſidered as a covenant on his part. The act was to be performed by his authority, and the covenant was his covenant.

On a conſideration, then, of the whole contract between the parties, the court is of opinion that Groverman remained the owner of the veſſel during the voyage, and is anſwerable for any miſconduct of the captain.

Hooe & co. v. Groverman.

The covenant to lay off and on at the port of Falmouth, being the covenant of Groverman, the freighters are not anſwerable in this action, for the breach of it, ſhould the orders of Fox be underſtood as their orders. It is probable that the courſe taken by the captain was the moſt prudent courſe; but were it otherwiſe, the orders of Fox might excuſe the owner from any action brought by the freighters for loſs ſuſtained by them in conſequence of going into Falmouth, but could not entitle him in this action againſt the freighters.

It is then the opinion of this court, that on this ſpecial verdict, the law is for the defendants.

Judgment reverſed, and the circuit court to enter judgment for the defendants.

GABRIEL WOOD, ORIGINAL DEFENDANT,

v.

WILLIAM OWINGS AND JOB SMITH,

ASSIGNEES OF

WILLIAM ROBB, A BANKRUPT, ORIGINAL PLAINTIFF.

ERROR from the fourth circuit court ſitting at Baltimore.

Wood v. Owings.

This was an action on the caſe, for money had and received by Wood to the uſe of Robb, the bankrupt.

A deed of lands in Maryland, ſigned, ſealed, and delivered on the 30th of May, and ac-

Judgment below was entered by conſent, ſubject to the opinion of the court on a caſe ſtating the following facts, viz.

WOOD v. OWINGS.

knowledged on the 14th of June, is to be considered as *made* on the 30th of May; and its acknowledgment on the 14th of June will not cause it to be such a deed as is contemplated in the bankrupt act which came into operation on the 2d of June.

On the 30*th of May*, 1800, Robb being in possession of his household furniture, and having two vessels and no other property, on the high seas, *signed*, *sealed*, and *delivered*, a deed to Charles Garts and Gabriel Wood, trustees in behalf of themselves and other creditors of Robb, therein particularly named, and such others of his creditors as should by a certain time assent to the terms of the trust; by which deed, Robb, in consideration of five shillings, and towards payment of the debts due to the *particular* creditors therein named in the first place, and in the next place of such of his creditors as should agree to the terms of the trust; grants, bargains, sells, &c. to Garts and Wood, *all his estate, real, personal, and mixed, and choses in action, &c.* in trust to sell the same and collect the debts, &c. and on receipt of the money, to retain in the first place the amount due to Garts and Wood, for money lent, &c. then to pay the debts due to the other creditors particularly named, and then to pay the debts due to such of his other creditors as should, within a certain time, agree to the terms of the trust; and if there should be a surplus to pay it over to Robb. That this deed was acknowledged on the 14th June, 1800.—That Robb did not on the said 30th of May, 1800, deliver to Wood, his books, but they remained in Robb's possession. That the vessels were not conveyed to Wood by any other conveyance than that before mentioned. That Robb continued in possession of his household furniture, books of accounts, and all his papers, until the suing out of the commission of bankruptcy, except the policies of insurance on the vessels, which were delivered to Wood at the time of delivering the deed. That Robb considered Wood as having a right to take possession of the books and papers, and personal estate, at any time after the delivery of the deed, but did not then expect to be obliged to stop business; on the contrary, that he actually went on with the hope of retrieving his affairs until the 20th June, 1800. That Robb was a trader before and after the 1st of June, 1800; that at the time of signing, sealing, and delivering of the said deed, he was the legal proprietor of a lot of ground in the state of Maryland, as assignee of a term of 99 years, renewable forever, and was also possessed of personal property, and had debts due to him; that Garts and Wood, and the other persons in the deed particularly named, were credi-

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tors of Robb; and that there were other creditors beſides thoſe particularly preferred in the deed. That a commiſſion of bankruptcy iſſued againſt Robb on the 12th July, 1800, *founded on the execution and acknowledgment of the ſaid deed*, under which Robb was declared a bankrupt, and his effects were aſſigned to the plaintiffs, Owings and Smith, by a deed of aſſignment on the 1ſt of May, 1801. And that the action is brought to recover all monies received by Wood, in virtue of the ſaid deed to Garts and Wood. If on the above ſtate of facts the plaintiffs were entitled to recover, then judgment was to be entered for the plaintiffs for 3000 dollars; but if, &c. then judgment of *non pros.*

By the bankrupt act of the United States, §. 1, it is enacted, that "*from and after the 1ſt day of June next,*" (1 June, 1800,) "if any merchant," &c. "with intent "unlawfully to delay or defraud his creditors, ſhall make "or cauſe to be made, any fraudulent conveyance of his "lands or chattels," "he ſhall be deemed and adjudged "a bankrupt."

Two queſtions were made by the counſel in the court below, viz.

1ſt. Whether this deed can be conſidered as made at the time of its acknowledgment on 14th June, 1800, ſo as to conſtitute it an act of bankruptcy, under the bankrupt law of the United States, which came into operation on the 2d June, 1800, or whether the acknowledgment ſhall relate back to the 30th May, 1800, the day on which the deed was ſigned, ſealed, and delivered, ſo that the deed ſhall be conſidered as made on that day.

2d. Whether, if made after the 1ſt of June, 1800, it can be conſidered as ſuch a fraudulent conveyance as is contemplated by the 1ſt §. of the bankrupt law.

Martin, for plaintiff in error,

Now waved the ſecond point and relied entirely on the firſt.

This involves three queſtions;

WOOD v. OWINGS.

1ſt. Whether the deed, ſigned, ſealed and delivered, on the 30th of May, and acknowledged on the 14th of June, is an act of bankruptcy under the law which came into operation on the 2d of June.

2d. Whether the ſigning, ſealing and delivery ſhall be conſidered as going forward to the time of acknowledgment; or,

3d. Whether the acknowledgment ſhall refer back to the time of the ſigning, ſealing, and delivery.

The debtor, independent of the bankrupt act, may prefer one creditor to another. No creditor can prevent him, unleſs by taking out a commiſſion of bankruptcy. This principle is acknowledged by all the ſtate governments, and by the laws of England, in caſes not within the bankrupt law.

In the caſe of *Hooper v Smith*, 1 *Bl. Rep.* 441, one Hooper being bona fide indebted to his mother, in the ſum of £. 800, at 8 o'clock in the morning aſſigned and delivered to his mother, half his ſtock in trade, which was taken away immediately to his mother's lodgings. On the evening of the ſame day he committed an act of bankruptcy. His aſſignees, by ſtratagem, got poſſeſſion of the goods and ſold them. The mother brought trover againſt the aſſignees, and recovered. Lord Mansfield, in that caſe, ſaid, that "a preference to one creditor, "eſpecially by aſſigning only part of his goods, and to "pay only part of the debt, has been frequently held to "be good; particularly in the caſe of Cock v. Goodfel-"low, (the caſe of a parent and child,) Small v. Owdly "and others." "Suppoſe he had ſold the goods in "queſtion to John or Thomas, and, with that ready "money, had paid his mother part of her debt; would "that ſale or payment have been void?"

The courts of Virginia, Maryland, and Pennſylvania, have always recognized the ſame principles. If the bankrupt law had never paſſed, this deed would have been protected in courts of law and equity.

Is this a fraudulent conveyance under the bankrupt law?

The acknowledgment is neceſſary for ſome purpoſes, but not to conſtitute it a deed.

A deed is defined to be a writing on parchment, or paper, ſealed, and delivered. Suppoſe a mortgage of lands, containing a covenant to pay money, be not acknowledged; it would not at law convey a legal title to the land, but it would be good as a covenant to pay the money; and would be good to paſs an equitable title to the land. Suppoſe it contained a conveyance of land and chattels; it would be good as to the chattels.

This ſhews that acknowledgment is not a neceſſary part of the deed; but only that a deed, not acknowledged, will not paſs a legal eſtate in lands, as to creditors.

But the act of Maryland, *November ſeſſion* 1766. *c.* 14. §. 2, ſays "that no eſtate of inheritance &c. ſhall paſs "or take effect, except the *deed* or conveyance by which "the ſame ſhall be intended to paſs or take effect, ſhall "be acknowledged before the provincial court &c. and "be alſo enrolled in the records of the ſame county," &c. It muſt therefore be a *deed* before the acknowledgment. And by the fifth ſection of the ſame act it is declared that every ſuch deed ſhall have relation, as to the paſſing and conveying the premiſes, from the day of the *date* thereof; thereby evidently contemplating it to be a deed from its date. This ſection was inſerted becauſe, by the former *act of* 1715, the deed took effect only from the time of its acknowledgment. But the law is the ſame independent of the poſitive declaration of this act. 1. *Bac. ab.* 277. *Bargain and ſale.* and 2. *Inſt.* 674. 675. where Lord Coke, in his expoſition upon the ſtatute of 27. *H.* 8. *c.* 6, of enrollments, ſays "And when the "deed is enrolled within ſix months, then it paſſeth "from the livery of the deed. And albeit, after the de-"livery and *acknowledgment*, either the bargainor, or bar-"gainee die before enrollment, yet the land paſſeth by "this act," "And by the words of this ſtatute, when "the deed is enrolled, it paſſeth *ab initio*." And he cites the caſe of *Mallery v. Jennings*, determined in the common pleas, 42. *Eliz.* which was this; "one Sewſter was "ſeized of certain lands in fee, and acknowledged a re-

WOOD v. OWINGS.

" cognizance to Turner, whoſe executrix brought a *ſcire* " *facias*, upon the recognizance, bearing date the 9th. " November, 41. *Eliz.* againſt Sewſter, and alleged him " to be ſeized of thoſe lands *in dominico ſuo ut de feodo*, the " day of the *ſcire facias* brought; and the truth of the " caſe being diſcloſed by long pleading, was this; Sewſter, " 7th November, before the recognizance acknowledged, " by deed indented, for money, had bargained and ſold " the ſaid land to another, and the deed was enrolled " the 20th November following. The queſtion was, " whether Sewſter was, upon the whole matter, ſeized in " fee the 9th of November, the deed being not enrolled " until the 20th of the ſame November. And it was " adjudged, *una voce*, that Sewſter was not ſeized in fee " of the land on the 9th day of November. For that " when the deed was enrolled, the bargainee was, in " judgment of law, ſeized of that land, from the *delivery* " of the deed. And it was reſolved, that neither the " death of the bargainor, nor of the bargainee, before " enrollment, ſhall hinder the paſſing of the eſtate. And " that a releaſe of a ſtranger to the bargainee, before en- " rollment, is good. So that it holds not by relation, be- " tween the parties, by *fiction of law*; but in point of " eſtate, as well to them, as to *ſtrangers* alſo. And that " a recovery ſuffered againſt the bargainee, before enroll- " ment, (the deed indented being, afterwards, within the " ſix months, enrolled) is good, for that the bargainee was " tenant of the freehold, in judgment of law, at the " time of the recovery. And *non refert* when the deed " indented is *acknowledged*, ſo it be enrolled within the " ſix months. And all this was afterwards affirmed for " good law by the court of common pleas, *Trin.* 3. *Iac.* " upon a ſpecial verdict given in an *Ejectione firmæ* be- " tween *Lellingham and Alſop*; and further it was there " reſolved, that if the bargainee of land, after the bar- " gain and ſale, and before the enrollment, doth bargain " and ſell the ſame, by deed indented and enrolled, to " another; and after the firſt deed is enrolled, within " the ſix months, the bargain and ſale, by the bargainee, " is good."

In 18 *Viner* 289 *Tit. Relation*, it is ſaid, " When *two* " *times, or two acts* are requiſite to the perfection of an

" act it ſhall be ſaid, upon their conſummation, to receive " its perfection from the *firſt*."

If A. makes a deed to B. on the 30th of May; and another for the ſame land to C. on the 1ſt June, and acknowledges it the ſame day; afterwards, on the 14th of June, he acknowledges the deed to B. this over-reaches the deed to C. and the acknowledgment of the deed to B. is not a fraudulent act.

Suppoſe A. makes a *bonâ fide* deed to B. for valuable conſideration, on the 30th of May. On the firſt of June A. commits an act of treaſon. On the 14th of June he acknowledges the deed to B. The land is not forfeited by the treaſon of A.

If an indictment had been found for forging this deed, and to ſupport the indictment, evidence had been given of the forgery of the acknowledgment only, would that have ſupported the indictment?

If a declaration upon this deed, ſtating it to have been made on the 14th of June, had been drawn, would it have been ſupported by producing in evidence, this deed ſigned, ſealed and delivered on the 30th of May?

This deed intends to convey *choſes in action*, and *perſonal effects*, as well as lands. As to the former the deed is good without acknowledgment; for as to the choſes in action, the deed without acknowledgment is an equitable aſſignment, and if acknowledged it would have amounted to nothing more.

But if the aſſignees are entitled, they muſt take the bankrupt's eſtate, ſubject to all the equity of others. 2 *Veazy, ſenr.* 585, 633. *Cooke's bankrupt law*, 203. *Tayler v. Wheeler*, 2 *Vern.* 564.

Courts of law will protect equitable rights; as in the caſe of *Winch and Keeley*, 1 *Term rep.* 619, where the plaintiff having aſſigned his right of action to Searle, and having become bankrupt, was ſtill held able to ſupport the action for the benefit of Searle, notwithſtanding the aſſignment of his effects under the bankrupt laws.

Wood
v.
Owings.

And by the authority of *ex parte Byas*, 1 *Atk.* 124, if the aſſignees had received the money due to Robb, the bankrupt, they would have been obliged to pay it over to Wood, the plaintiff in error, inſtead of receiving it from him.

The deed is not fraudulent *in ſe*; and would not now be queſtioned if the bankrupt law had not been paſſed. Although it is a deed of all his effects, yet it is not an abſolute deed, nor was it made on any ſecret truſt, or for his own benefit. The only thing which can be alleged againſt it is, that it gives a priority to ſome of his creditors, and this he had a clear right to do, both in law and equity. It was not made in ſecret; it holds up no falſe colours, it enables him to receive no falſe credit. He might have ſold the property for ready money, and paid any one of his creditors in full. But making a deed of truſt, he has prevented a ſacrifice of his property, whereby it is competent to ſatisfy a greater number of his creditors, and he is himſelf rendered more able to pay the reſidue of his debts by his future induſtry.

The committing an act of bankruptcy is, in law, conſidered as criminal. The bankrupt law is, therefore, in this reſpect, to be conſtrued ſtrictly. It ought not to be extended beyond the letter of the law. *Cooke B. L.* 67. *Cowp.* 409, 427, 428. 5 *Term rep.* 575. 7 *Term rep.* 509. *Fowler v. Padget.*

But however fraudulent the deed might have been, yet it was no act of bankruptcy, under the act of congreſs; becauſe not executed after the 1ſt of June; unleſs the acknowledgment can be conſidered as the *making* of the deed. And if it was not an act of bankruptcy, the title of the defendants in error fails.

Harper, contra.

The act of bankruptcy charged, is the making a fraudulent deed after the 1ſt June, 1800. The counſel for the plaintiff in error having abandoned the ſecond point which was made, and ſtrongly contended for, in the court below, the only queſtion now to be conſidered is, whether the deed was made before or after the 1ſt of June.

A deed, at common law, is an inſtrument in writing ſigned, ſealed and delivered. If it be ſigned and ſealed, but not delivered, it is no deed; and the reaſon is, that until the laſt act of volition is performed, there is ſtill a power of recalling it.

The caſes from the Engliſh books reſpecting the ſtatute of enrollments, are not applicable to the law of Maryland reſpecting acknowledgment. The Engliſh laws only protect creditors and purchaſers without notice. But the law of Maryland is intended to protect the maker of the deed himſelf, to prevent forgeries and fraud, and to give a further ſolemnity, that the grantor may have more time to reflect, and to ſecure himſelf from being ſuddenly entrapped. The law therefore ſuperadds to ſigning, ſealing and delivery, a further act of volition.

It is ſaid that a court of equity will ſet up ſuch a deed; true, it would, in certain caſes; but not becauſe it is a paper ſigned and ſealed; but becauſe it is a contract for a valuable conſideration. But this deed would never have been ſupported in a court of equity, if it had not been completely valid at law. Suppoſe Robb had refuſed to acknowledge it; and application had been made to chancery to carry the deed into effect; it would have been refuſed.

Can a deed be ſaid to be made when it is not complete? It was not complete on the 30th of May; ſomething was ſtill to be done, of which it would have been neceſſary to apply to a court of chancery to compel the performance.

If acknowledgment is neceſſary by ſtatute law, it is the ſame as if neceſſary by common law. The one is as binding as the other. They are both derived from the ſame ſource, but evidenced in different modes. Signing, ſealing and delivery only are neceſſary by the common law, but acknowledgment alſo is neceſſary by the ſtatute.

The deed of land was an act of bankruptcy, and prevented the operation of the deed as a deed of perſonal eſtate. The deed for the land and for the chattels was executed *eodem inſtanti*.

WOOD v. OWINGS

Chaſe, Juſtice. The effect of an acknowledgment is to prevent the grantor from pleading *non eſt factum.*

Harper. By the law of England acknowledgment is not neceſſary. But by the law of Maryland it is a neceſſary part of the conveyance, and can no more be diſpenſed with, than the ſigning, ſealing and delivery. Having ſigned and ſealed, the grantor may refuſe to deliver; ſo, having ſigned, ſealed and delivered, he may refuſe to acknowledge, and in either caſe it is no deed. The deed, therefore, was not made till the 14th of June.

Martin, in reply.

Acknowledgment is abſolutely neceſſary in England, before enrollment. *Viner, Tit. Enrollment, p.* 443 "no "deed, &c. can be enrolled, unleſs duly and lawfully "*acknowledged*, cites *Co. Lit.* 225 (b.)" The acknowledgment is the warrant for the enrollment. An acknowledgment in Maryland has no greater effect than in England.

There was an enrollment at common law, for ſafe cuſtody, it makes an eſtoppel, and the party cannot plead *non eſt factum.* Per Holt ch. j. *Comb.* 248, *Smart v. Williams, cited in Viner, tit. enrollment, p.* 444. *And in p.* 445, it is ſaid, "Enrollment of a deed is to no other purpoſe, "but that the party ſhall not deny it afterwards," and cites *Br. Faits enrol. pl.* 4. And in *Sav.* 91. *Holland v. Downes* cited in *Viner tit. enrollment p.* 446, 447, it is ſaid "the *ſealing and delivery* is the force of ſuch deeds, "as deeds of bargain and ſale, &c. and not the *enroll-*"*ment.*" And again, in the ſame caſe, "Bonds, indentures "and deeds take their force by the delivery; ſo there is a "perfect act before the conuſance is taken, and before "any enrollment." The enrollment could not be made upon proof by witneſſes. The acknowledgment was the only authority.

Harper.

The enrollment is the act of the grantee. The acknowledgment is the laſt act of volition of the grantor. It is wholly voluntary; he may refuſe; and if he does, the deed has no effect. In England, the acknowledgment is

a regulation of the courts, not a proviſion of the ſtatute of enrollments. That ſtatute is different from the act of Maryland; the latter expreſsly requires the acknowledgment, and no eſtate paſſes at law without it. It therefore becomes as much a requiſite of a deed, as ſealing or delivery. It is not only an abſolute requiſite that the deed ſhould be acknowledged, but the courts of Maryland have been very ſtrict in requiring it to be done preciſely in the mode preſcribed. In the caſe of *Hall and Gittings*, decided in the court of appeals in Maryland, the caſe was, that the grantor reſided in *Anne Arundel* county, but the deed deſcribed him as a reſident of *Baltimore* county, where the lands were ſituated. The acknowledgment was made in *Prince George's* county. This acknowledgment was decided by the court of appeals not to be good, and the cauſe was loſt, upon that ground, although the deed was twenty-five years old, and poſſeſſion had been quietly enjoyed under it. The error was diſcovered by the court themſelves, and had not been ſuggeſted by the counſel at the trial.

It has alſo been decided that the acknowledgment of a *feme covert* muſt be preciſely in the form preſcribed by the act.

This ſhews the great importance of acknowledgments in Maryland.

Martin, in reply.

The acknowledgment in England is not a regulation of the courts only, but is a principle of the common law relative to enrollment, which exiſted before the ſtatute of enrollments. It was known, at the time of enacting that ſtatute, that by the common law, an acknowledgment was a pre-requiſite to enrollment. It was not neceſſary therefore that it ſhould be expreſsly preſcribed by ſtatute. Acknowledgment and enrollment was a proceeding well known and underſtood, and was not originated by the ſtatute of 27 H. 8. The ſtatute only applies the proceſs to new caſes, or makes it neceſſary where before it was only voluntary.

As to the caſe of a *feme covert*, ſhe could not, by the

Wood v. Owings.

common law, convey her land, except by fine and recovery. But the law of Maryland authorized her to do it in a certain mode. That mode must therefore be ſtrictly purſued.

March 1ſt. The chief juſtice delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of the fourth circuit ſitting at Baltimore, in the following caſe.

On the 30th of May, 1800, William Robb, who was then a merchant carrying on trade and merchandize, in the ſtate of Maryland, ſigned, ſealed and delivered to Gabriel Wood, an inſtrument of writing, purporting to convey to the ſaid Gabriel, his real and perſonal eſtate in truſt, to ſecure him from certain notes and acceptances made by him, on account of the ſaid Robb, and afterwards, in truſt for other creditors in the deed mentioned. This deed was acknowledged on the 14th of June; and was then enrolled according to the laws of Maryland.

On the 12th of July, 1800, a commiſſion of bankruptcy was ſued out, *founded on the execution of the deed above mentioned*, and the ſaid William Robb, being declared a bankrupt, his effects were aſſigned to William Owings and Job Smith, who brought this ſuit againſt Gabriel Wood, to recover the money received by him under the deed aforementioned.

Judgment was confeſſed by the defendant below, ſubject to the opinion of the court on a caſe ſtated, of which the foregoing were the material facts.

The court gave judgment in favor of the aſſignees, to which judgment a writ of error was ſued out by the preſent plaintiff.

The only queſtion made by the counſel was, whether the deed, ſtated in the caſe, was an act of bankruptcy.

On the 4th of April, 1800, congreſs paſſed an act to eſtabliſh an uniform ſyſtem of bankruptcy throughout

the United States, which declares, among other things, that any merchant who ſhall, after the firſt day of June next ſucceeding the paſſage of the act, with intent unlawfully to delay or defraud his creditors, make or cauſe to be made any fraudulent conveyance of his lands or chattels, ſhall be deemed and adjudged a bankrupt.

It was admitted, in the argument, that this deed, if executed after the 1ſt day of June, would have been an act of bankruptcy, but that being ſealed and delivered on the 30th of May, it was not within the act, which only comprehends conveyances made after the 1ſt of June.

For the defendants in error, it was contended, that, by the laws of Maryland, a deed is not complete until it is acknowledged, and therefore this conveyance was made on the 14th of June, when it was acknowledged; and not on the 30th of May, when it was ſealed and delivered.

The Maryland act alluded to was paſſed in 1766, and declares, "that after the firſt day of May next, no eſtate "of inheritance or freehold, or any declaration or limi- "tation of uſe, or any eſtate for above ſeven years, ſhall "paſs or take effect, except the deed or conveyance, by "which the ſame ſhall be intended to paſs or take effect, "ſhall be acknowledged in the provincial court, or before "one of the juſtices thereof, in the county court, or be- "fore two juſtices of the ſame county where the lands, "tenements, or hereditaments, conveyed by ſuch deed "or conveyance do lie, and be alſo enrolled, &c. within "ſix months after the date of ſuch deed or convey- "ance."

The 5th ſection gives the conveyance, ſo acknowledged and enrolled, relation to the date thereof.

It is a well eſtabliſhed doctrine of the common law, that a deed becomes complete, when ſealed and delivered. It then becomes the act of the perſon who has executed it, and whatever its operation may be, it is his deed. The very act of livery, which puts the paper into the poſſeſſion of the party for whoſe benefit it is made, ſeems to require the conſtruction that it has become a deed.

WOOD v. OWINGS.

The queſtion now made to the court is, whether the act of the legiſlature of Maryland has annexed other requiſites to an inſtrument of writing conveying lands, without the performance of which, not only the paſſing of the eſtate, intended to be conveyed, is arreſted, but the inſtrument itſelf, is prevented from becoming the deed of the perſon who has executed it.

Upon the moſt mature conſideration of the ſubject, the opinion of the court is, that the words, uſed in the act of Maryland, which have been recited, conſider the inſtrument as a deed, although inoperative 'till acknowledged and enrolled.

The words do not apply to the inſtrument, but to the eſtate that inſtrument is intended to convey.

Since then the bankrupt law of the United States does not affect deeds made prior to the 1ſt of June, 1800, and this deed was made on the 30th of May, 1800, the court is of opinion, that the rights, veſted by the deed, (whatever they might be) are not diveſted in favor of the aſſignees of the bankrupt, and therefore, that they ought not to have recovered in this caſe.

Judgment reverſed—and judgment of *non pros* to be entered.

UNITED STATES v. SIMMS.

U. STATES v. SIMMS.

ERROR from the circuit court of the diſtrict of Columbia, ſitting at Alexandria, to reverſe a judgment rendered by that court for the defendant, on an indictment for ſuffering a faro bank to be played in his houſe, contrary to an act of aſſembly of Virginia.

The acts of congreſs of 27th Feb. and 3d of March, 1801, concerning the diſtrict of Columbia, have not changed

The indictment ſets forth that Simms, "on the 1ſt "April, 1801, with force and arms, at the county of "Alexandria, did ſuffer the game called the faro bank to

" be played, by divers perſons, in a houſe of which he, " the ſaid Jeſſe Simms, then and there, at the time of the " ſaid play, had the poſſeſſion and uſe, contrary to the " form of the ſtatute in that caſe lately made and pro- " vided, and againſt the peace and government of the " United States."

The record which came up contains a bill of exceptions, taken by the attorney for the United States, to the opinion of the court; which opinion was, " that the pro- " ceeding by indictment to recover the penalty impoſed " by law for the offence ſtated in the indictment in this " caſe filed, was improper, illegal, and could not be ſuſ- " tained."

The act of aſſembly of Virginia, *January* 19, 1798, *p.* 4. *ch.* 2. §. 3. upon which the indictment was founded, is in theſe words, " Any perſon whatſoever, who ſhall ſuf- " fer the game of billiards, or any of the games played at " the tables commonly called the A. B. C.—E. O. or faro " bank, or any other gaming table, or bank of the ſame " or the like kind, under any denomination whatever, to " be played in his or her houſe, or in a houſe of which " he or ſhe hath at the time the uſe or poſſeſſion, ſhall, " for every ſuch offence, forfeit and pay the ſum of one " hundred and fifty dollars, to be recovered in any court " of record, *by any perſon who will ſue for the ſame.*"

" §. 8. The preſiding juſtice, as well in the diſtrict as " in all the inferior courts of law in this commonwealth, " ſhall conſtantly give this act in charge to the grand ju- " ries of their courts, at the times when ſuch grand juries " ſhall be ſworn."

Maſon, attorney for the United States.

The only queſtion is whether an indictment was the proper proceſs.

This depends upon the act of aſſembly of Virginia of the 19th of January, 1798, and the acts of congreſs reſpecting the diſtrict of Columbia.

By the act of congreſs, 27 *February*, 1801, *vol.* 5. *p.* 268, *ch.* 86. §. 1. it is enacted that the laws of Virginia ſhall

the laws of Maryland and Virginia, adopted by congreſs as the laws of that diſtrict, any further than the change of juriſdiction rendered a change of laws neceſſary. Fines, forfeitures, and penalties, ariſing from a breach of thoſe laws are to be ſued for and recovered in the ſame manner as before the change of juriſdiction, *mutatis mutandis.*

U. STATES v. SIMMS.

be and continue in force in that part of the district which was ceded by Virginia. And by the act of congress of 3*d March*, 1801, *p.* 287. §. 2. supplementary to the act of 27th February, it is enacted, "that all indictments "shall run in the name of the United States, and con- "clude against the peace and government thereof; and "all fines, penalties and forfeitures accruing under the "laws of the states of Maryland and Virginia, which "by adoption have become the laws of this district, shall "be recovered with costs, by indictment or information in "the name of the United States, or by action of debt in "the name of the United States and of the informer; "one-half of which fine shall accrue to the United States, "and the other half to the informer; and the said fines "shall be collected by, or paid to the marshal, and one- "half thereof shall be by him paid over to the board of "commissioners herein after established, and the other "half to the informer."

By the act of Virginia the penalty is to be recovered by *any person who will sue for the same.* If the question had depended upon this act alone, it would not have been brought before this court. But the act of congress has changed the mode of recovery, and made an indictment necessary.

C. Lee, for defendant.

"When a statute appoints a penalty for the doing of a "thing which was no offence before, and appoints how "it shall be recovered, it shall be punished by that means, "and not by indictment." *Cro. Jac.* 643. *Castles case*, and 2. *Burrow*, 803, *Rex v. Robinson.*

The statute of Virginia contains in itself, the mode of prosecution; and it being such (to wit, an action of debt by an informer,) as could not be affected by the transfer of jurisdiction, and the statute being adopted by congress *in toto*, there is no necessity of resorting to another mode. The supplementary act of congress of the 3d of March 1801 was intended to operate upon those cases under the laws of Virginia, where it had been necessary to use the name of the commonwealth in the recovery of fines, forfeitures and penalties, and can not be supposed to intend

to take away a private right, or to alter the mode of profecution, unleſs ſome alteration had become neceſſary, in conſequence of the change of government. That act muſt be conſtrued, *reddenda ſingula ſingulis*; that is, where the mode of profecution under the ſtate laws was by indictment, or information in the name of the commonwealth, it ſhould, in future, be by indictment, or information in the name of the United States; and where, by the ſtate laws, the mode of profecution was an action *qui tam*, or an action of debt in the name of the informer, it ſhould, in future, be an action *qui tam* in the name of the United States and of the informer, or an action of debt in the name of the informer alone.

Maſon, in reply.

The legiſlature of Virginia certainly had the right and power to alter the mode of recovering the penalty, if they thought proper; ſo had congreſs as ſoon as the juriſdiction devolved upon them. The words of the act of congreſs are ſufficiently broad to take in this caſe. The act ſays, all fines, penalties and forfeitures *ſhall* be recovered by indictment, or information in the name of the United States, or by action of debt in the name of the United States, and of the informer; that is, where the penalty is to be recovered without the intervention of an informer, there it ſhall be by indictment or information in the name of the United States; but where an informer appears and claims the penalty, there it ſhall be a *qui tam* action of debt; and half the penalty is to go to the United States, and half only to the informer. In this caſe there was no informer who claimed the penalty. The preſentment was made by the grand jury.

Congreſs did not mean ſimply to render *ſingula ſingulis*. It was found that the criminal code of Virginia could not be carried into effect in this diſtrict for want of a penetentiary houſe. Congreſs therefore took up the criminal ſyſtem and reviſed it. They have pointed out both the mode of proſecution and the appropriation of the penalty. They have allowed an informer to come in, in all caſes, and claim half of the penalty; and where, by the ſtate laws, the whole went to the informer, they have declared that half ſhall go to the United States.

U. STATES v. SIMMS.

Feb. 23d. *The Chief Juſtice* delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the diſtrict of Columbia, ſitting in the county of Alexandria, in the following caſe.

By an act of the legiſlature of Virginia a penalty of £.150 is impoſed on any perſon who permits certain games, enumerated in the act, to be played in a houſe of which he is the proprietor. The penalty, by that act, is given to any perſon who will ſue for the ſame.

After the paſſage of this act, congreſs aſſumed the government of the diſtrict, and declared the laws of Maryland to *remain* in force in that part of the diſtrict which had been ceded by Maryland; and the laws of Virginia to remain in force in that part of the diſtrict which had been ceded by Virginia.

Subſequent to the act of aſſumption an act paſſed, ſupplementary to the act entitled "An act concerning the diſtrict of Columbia;" the ſecond ſection of which is in theſe words: (here the chief juſtice read the whole ſection, and the ſubſtance of the indictment.)

It is admitted that, under the laws of Virginia, an indictment for this penalty could not be ſuſtained; but it is contended that the clauſe in the ſupplemental act which has been recited, makes a new appropriation of the penalty, and gives a new remedy for its recovery.

It is inſiſted that the words "all fines, penalties and "forfeitures accruing under the laws of Maryland and "Virginia," &c. neceſſarily include this penalty, and by giving a recovery in the name of the United States by indictment, appropriate the penalty to the public treaſury. On the part of the defendant in error it is contended that the words relied on do not change the law, further than to ſubſtitute in all actions heretofore carried on in the names of the ſtates of Maryland and Virginia reſpectively, the name of the United States inſtead of thoſe names; and that the proviſions of the act apply only to

fines, penalties and forfeitures accruing to the government.

This subject will perhaps receive some elucidation from a review of the two acts of congress relative to the district of Columbia.

The first section of the first act, declaring that the laws of the two states respectively should remain in force in the parts of the territory ceded by each, was perhaps only declaratory of a principle which would have been in full operation without such declaration; yet it manifests very clearly an intention in congress not to take up the subject of a review of the laws of the district at that time, but to leave things as they then were, only adapting the existing laws to the new situation of the people.

Every remaining section of the act to the 16th, is employed on subjects where the mere change of government required the intervention of the general legislature.

The sixteenth section continues still to manifest a solicitude for the preservation of the existing state of things, so far as was compatible with the change of government, by declaring that nothing contained in the act should be construed to affect rights granted by or derived from the acts of incorporation of Alexandria and Georgetown, or of any body politic or corporate within the said district, except so far as relates to their judicial powers.

This act had given to the circuit court, which it established, cognizance of all crimes committed in the district, and of all penalties and forfeitures accruing under the laws of the United States.

It was soon perceived that the criminal jurisdiction of the court could not be exercised in one part of the district, because by the laws of Virginia, persons guilty of any offence, less than murder in the first degree, were only punishable in the penitentiary house, erected in the city of Richmond, which punishment the court of Columbia could not inflict.

U. STATES v. SIMMS.

It was also perceived that some embarrasment would arise respecting the style in which suits, theretofore directed to be brought in the names of Maryland and Virginia, should thenceforth be prosecuted. The respective laws authorizing them, and which were considered as having been re-enacted by congress, *totidem verbis*, directed such suits to be prosecuted in the names of Maryland and Virginia, respectively. The continuance of this style in the courts of the United States was glaringly improper, and it was thought necessary to change it by express provision. These objects rendered the supplemental act necessary, which provides, that the criminal law of Virginia, as it existed before the establishment of a penitentiary system, should continue in force, and that all indictments shall run in the name of the United States; and all fines, penalties, and forfeitures, accruing under the laws of the states of Maryland and Virginia, shall be recovered with costs, &c.

The residue of this supplemental act changes nothing, and only supplies provisions, required by the revolution in government, and which had been omitted in the original act.

This view of the two acts would furnish strong reasons for supposing the object of congress to have been, not to change, in any respect, the existing laws, further than the new situation of the district rendered indispensibly necessary; and that the fines, penalties, and forfeitures alluded to in the act, are those only which accrued by law, in the whole or in part, to government; and for the recovery of which the remedy was by indictment or information, in the name of the state in which the court sat, or by a *qui tam* action in which the name of the state was to be used. It can not be presumed that congress could have intended to use the words in the unlimited sense contended for.

By the laws of Virginia, an officer is liable to a heavy fine for not returning an execution which came to his hands to be served, or for retaining in his hands money levied on such execution. This goes to the party injured, and on his motion the judgment for the fine is to be rendered. It would be going a great way to construe this act

of congreſs as making ſuch a fine recoverable for the uſe of the United States; and yet, this would be the conſequence of conſtruing it to extend to fines and penalties accruing by law, not to government, but to individuals.

If a penalty recoverable by any individual, by action of debt, was to be conſidered as deſigned to be embraced by the ſecond ſection of the ſupplemental act, ſtill an action of debt in the name of the United States and of the informer, would ſeem to be the remedy given by the act.

The principle, *reddenda ſingula ſingulis*, would be applicable; and it would ſeem to the court more proper to ſuppoſe the *qui tam* action, given in this caſe, to be the remedy, than an indictment.

The court therefore is of opinion that there is no error in the judgment, and that it be affirmed.*

FENWICK v. SEARS'S ADMINISTRATORS.

An adminiſtrator, having had letters of adminiſtration in Maryland before the ſeparation of the diſtrict of Columbia from the original ſtates, can not, after that ſeparation, maintain an action in that part of the diſtrict ceded by Maryland, by virtue of thoſe letters of adminiſtration; but muſt take out new letters within the diſtrict.

ERROR from the judgment of the circuit court of the diſtrict of Columbia, ſitting at Waſhington, in an action on the caſe on a foreign bill of exchange, by the adminiſtrators of the indorſee againſt the indorſer.

The caſe, as it appears in the pleadings and bills of exceptions, was as follows:

Francis Lewis Taney, at Paris, in France, drew the following bill of exchange: "Paris, 5th Auguſt, 1797, "Sixty days after ſight of this my ſecond of exchange, "(firſt and third not paid) pay to the order of Mr. Jo-

* The defendant's counſel prayed that the affirmance might be *with coſts*. It was ſuggeſted by ſome of the gentlemen of the bar, that the queſtion of giving coſts againſt the United States would be fully argued in the caſe of the United States v. Hooe, at this term. The court therefore poſtponed the ſubject till that argument ſhould be had. That cauſe however went off upon another ground without any argument on the queſtion of coſts. And the court did not give any directions reſpecting the coſts in the preſent caſe.

FENWICK v. SEARS'S ADMINRS.

"seph Fenwick the sum of three hundred and fifty dol-
"lars, for value received in account, which charge as
"advised by your most obedient servt. *Fras. Lew. Taney.*"
"To Messrs. Ben. Stoddert and John Mason, George-
"town, Maryland."

This bill was indorsed by Fenwick to George Sears, of Baltimore, and on the 30th of March, 1798, it was presented for acceptance, refused, and protested in the usual form for non-acceptance, by Samuel Hanson of Samuel, stiling himself notary public for the county of Montgomery in the state of Maryland, dwelling in George-town, in said county, *duly commissioned and sworn.*

On the 2d of June, 1798, payment of the bill was demanded of the drawees by the same notary, and refused, whereupon, on the same day he protested it in the usual form for non-payment. Fenwick, the indorser, was at the time of indorsing, and had been for ten years before, a resident of France, but in the year 1800 he came to this country, and on the 4th of April, 1801, the plaintiffs below brought suit against him here upon his indorsement. The declaration had two counts, one upon the *non-acceptance* of the bill, the other for money had and received.

The defendant below pleaded,

1st. *Non-assumpsit.*

2d. That the plaintiffs "have not obtained letters of "administration on all and singular the goods and chat-"tels, rights and credits, which were of the said George, "at the time of his decease, to wit, at Washington coun-"ty aforesaid, and this he is ready to verify, wherefore "he prays judgment," &c. to which the plaintiffs replied, "that the said George Sears, the intestate, departed this "life, in the town of Baltimore, in the county of Bal-"timore, in the state of Maryland, which was at that "time his place of residence, on the day of "in the year of our Lord 1800, intestate; and after-"wards, to wit, on the 8th day of November, in the "year aforesaid, administration of all and singular the "goods and chattels, rights and credits of the said intes-"tate, was granted to the said John Stricker and Henry

Quere, whether the acts of a notary public who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not actually sworn in due form?

Whether, between contending parties, the certificate of a notary public, that he is "duly "commissioned "and sworn," can be contradicted?

Whether a protest for non-payment of a bill of exchange must be made on the last day of grace?

Whether the reasonableness of notice be matter of fact, or matter of law?

Whether, on a count for money had and received, notice of non-acceptance, and of non-payment be necessary to charge an indorser who knew, at the time of indorsement, that the drawer had no right to draw.

"Payſon, in due form of law, by William Buchanan, "regiſter of wills for Baltimore county aforeſaid; an "exemplification of the letters of adminiſtration granted "to the ſaid Stricker and Henry Payſon as aforeſaid, duly "authenticated, is now here to the court produced; and "this they are ready to verify; wherefore, they pray "judgment," &c. To this replication there was a gene- "ral demurrer and joinder; which demurrer was over- "ruled by the court below.*

On the trial of the iſſue in fact, five bills of exceptions were taken by the defendant's counſel.

The firſt ſtated that the defendant objected to the ſecond bill of the ſet of exchange, going in evidence to the jury, unleſs the plaintiff firſt offered evidence to account for the firſt and third of exchange, and to ſhew that they or either of them were not paid or paſſed in the courſe of buſineſs to ſome other perſon who ſtill holds the ſame, but the court over-ruled the objection, and ſuffered the ſecond bill to be read.

The ſecond bill of exceptions ſtated that the defendant objected to the admiſſion of the two proteſts in evidence, becauſe, as he alleged, Samuel Hanſon of Samuel, was not a notary public on the 30th of March, 1798, or on the 2d of June, 1798, and to prove this the defendant offered to give evidence to prove that the ſaid Hanſon, previous to the 30th of March, 1798, had been named and appointed by the governor of the ſtate of Maryland, by and with the advice and conſent of the council of Maryland, a notary public, but that he never did take the oath or oaths preſcribed for a notary public to take, until after the 3d day of June, 1798, but the court were of opinion that the evidence *ſo* offered to prove that the ſaid Hanſon was not a notary public, was not admiſſible for that purpoſe, and refuſed to let the ſaid evidence be given; and the proteſts were permitted to be read to the jury.

3d. That the defendant's counſel prayed the court to direct the jury that the proteſt for *non-payment* is not ſuch

* The juriſdiction of the ſeveral ſtates of Virginia and Maryland over the territory ceded by them to the United States, for the ſeat of government, ceaſed on the firſt Monday of December, 1800.

FENWICK v. SEARS'S ADMINRS.

a proteſt as by the law of merchants is required, and was not made within the time by the law and cuſtom of merchants required, and therefore that the plaintiffs cannot in this caſe recover of the defendant upon the ſaid bill of exchange; but the court refuſed to give ſuch inſtruction.

4th. The fourth bill of exceptions ſtated at great length the teſtimony of ſeveral witneſſes, tending to ſhew notice of the non-payment given to the defendant in this country ſome time in 1800 or 1801, and that the defendant had made ſome propoſitions for ſettling the bill. That the drawees had no funds of the drawer in their hands. That the drawees held a deed from the drawer of certain lands in Georgia and North-Carolina, and an aſſignment of a large demand on the French government, and of another large demand againſt an individual in France, which they held in truſt to pay certain debts due from the drawer, and to pay him the ſurplus if any. That they had permitted the drawer to go to France and attend to theſe claims and ſell the lands, but that it was underſtood between them and the drawer that he ſhould bear his own expenſes, but that they did not inform the defendant of that circumſtance. That at the time he went they thought favourably of the truſt and wrote by the drawer to the defendant, expreſſing their opinion of it, and incloſing to the defendant a power of attorney to act for them in the buſineſs and to receive any monies that might be recovered under the truſt, and informing him that the drawer would attend and look after the ſaid concerns. That at the time of preſenting the bill they had not received any money under the truſt, but were in advance on that account. That the bill was endorſed by the defendant to enable the drawer to raiſe money in France, for the purpoſe of ſupporting his neceſſary expenſes whilſt he was proſecuting there thoſe claims in which the drawees were intereſted as truſtees, and that the drawer ſold them for that purpoſe. That the defendant came to this country on buſineſs in October 1800, and returned to France in May 1802, and during his ſtay in this country made Georgetown his place of reſidence.

That after this bill was drawn, the drawer received in France a ſum of between 2000 and 3000 dollars, in the

beginning of the year 1798; that during the years 1798, 1799, and 1800, French ſhips were permitted to ſail directly from America to France, for the purpoſe of carrying Frenchmen home; this happened perhaps twice a year or oftener. That during theſe years there was a communication between America and France for letters, &c. through the medium of London and Hamburgh. That after the ſpring of 1798, American veſſels were very often captured by the French armed veſſels on the high ſeas; and that at the time previous to the year 1798, American ſhips were embargoed in France.

The defendant then prayed the court to inſtruct the jury that upon the whole evidence, as ſtated, the plaintiffs, by their neglect in not giving notice to the defendant, the indorſer on the ſaid bill, that it was proteſted for non-acceptance and for non-payment, ſooner than they did, had releaſed the defendant from all reſponſibility on the ſame, and could not recover thereon; which direction was not given as prayed, the court being divided in opinion whether, in this caſe, the queſtion of reaſonable notice was a matter of law to be determined by the court, or a matter of fact to be determined by the jury. But the court were of opinion, and ſo directed the jury, *that if they ſhould be of opinion from the evidence, that the defendant who indorſed the bill drawn by F. L. Taney in this ſuit, knew, at the time of ſuch indorſement, that the ſaid Taney had no effects in the hands of the drawers, on which he could draw,* notice of the non-payment, or of the proteſt therefor, was not neceſſary to enable the plaintiffs to recover, in this action, *on the count for money had and received.*

The fifth bill of exceptions, after repeating the evidence at length, ſtated that the defendant prayed the court to inſtruct the jury, that although they might be of opinion that Fenwick, the defendant, knew at the time of his indorſement that the drawer had no effects in the hands of the drawees on which he could draw, yet, to ſupport an action, on the bill of exchange, againſt the defendant, it was neceſſary for the plaintiffs to give him reaſonable notice of the proteſt of the bill for non-acceptance *or* non-payment, one or the other; and that under the circumſtances of this caſe, notice to the ſaid Fenwick of

FENWICK v. SEARS'S ADMINRS.

ſuch proteſt for non-acceptance, or non-payment, *in October* 1800, was not reaſonable notice; whereupon the court were of opinion and directed the jury that if they were ſatisfied from the evidence that the defendant, at the time he endorſed the bill, knew that Taney had no effects in the hands of the drawees, upon which he could draw, ſtill it was neceſſary for the plaintiffs, in order to ſupport their action againſt the defendant, upon the *firſt* count in the declaration, to give him reaſonable notice of the proteſt for non-acceptance or for non-payment, one or the other; but whether under the circumſtances of this caſe, reaſonable notice had been given, to the ſaid Fenwick, of the ſaid proteſt, the court gave no opinion; being divided in opinion whether the ſame was matter of law to be determined by the court, or matter of fact to be determined by the jury.

Verdict for the plaintiff, 439 dollars, and 46 cents, and judgment accordingly, to reverſe which the preſent writ of error was brought by the defendant.

Maſon, for plaintiff in error.

Simms and C. Lee, for defendants.

Maſon, now waved the conſideration of the firſt bill of exceptions, and relied upon the following points.

1ſt. That the proteſts ought not to have been admitted to be given in evidence, becauſe, Hanſon who made them, although he ſtiles himſelf notary public, was not a notary public.

2d. That the proteſt for non-payment was not a ſufficient proteſt to charge the indorſer, becauſe it was not made *within* the days of grace, but on the day after the laſt day of grace.

3d. That the notice of the non-payment given to the defendant was not given in reaſonable time; and did not come from an indorſee, but from Judah Hays, for whoſe uſe this ſuit is brought. The court, and not the jury, are to decide what is reaſonable notice.

4th. The letters of adminiſtration granted in Maryland, before the juriſdiction over the diſtrict of Columbia veſted in the United States, do not authorize the plaintiffs to maintain an action, as adminiſtrators, within the diſtrict, after the transfer of the juriſdiction.

1ſt. That Hanſon was not a notary public, and therefore the proteſt void.

A proteſt by a perſon having due authority, is the only evidence which can be received of the non-acceptance or non-payment of a foreign bill, to charge the indorſer. *Kyd*, 136. 142. (87. 91.)

The only perſon who can have ſuch due authority is a notary public. *Kyd.* 137. (87.)

With regard to inland bills and promiſſory notes, the ſtatute of Anne is adopted in Maryland, and the courts of Maryland are governed by the ſame rules, laws and authorities as the Engliſh courts.

By the conſtitution of Maryland, §. 48, notaries public are to be appointed by the governor and council. The 55th ſection declares, "that any perſon appointed to any "office of profit or truſt, ſhall, *before he enters on the ex-* "*ecution thereof*," take the oath therein preſcribed, "and "ſhall alſo ſubſcribe a declaration of his belief in the "Chriſtian religion."

The act of aſſembly of Maryland, Feb. 1777, ch. 5, preſcribes an oath of office to be taken before the officer enters into the execution of his office.

The act of aſſembly, Nov. 1779, c. 25, §. 2, aſcertains his fees, and the 8th ſection preſcribes the form of another oath to be taken, before entering on the duties of his office, under a penalty of £. 150.

If a man aſſumes a character which he does not poſſeſs, and a ſeal to which he has no right, his acts are not obligatory. No man can conſtitute himſelf a notary public. If not duly appointed and qualified, his proteſt is not better than the proteſt of any other perſon. If

FENWICK v. SEARS'S ADMINRS.

Hanſon had not taken the oaths, and if he could not act until he had taken them, then the proteſt is not by a notary; and it was competent to the defendant to give evidence to prove that he had not taken the neceſſary oaths.

2d. The proteſt for non-payment was made a day too late. The bill was preſented for acceptance on the 30th of March. The laſt day of grace was the 1ſt of June. The proteſt was on the 2d of June.

The cuſtom as to the days of grace and the mode of computation of time, is ſtated in *Kyd*, 9, *(6.)*

The bill muſt be preſented for payment *within* the days of grace and proteſted on the *laſt* day of grace. *Kyd*, 136, 142, (87, 97.)

Although the bill be proteſted for non-acceptance, yet it muſt be preſented for payment at the time it becomes due and regularly proteſted for non-payment. And although a right of action accrues upon the proteſt for non-acceptance, yet the holder is held to have diſcharged the drawer and indorſers, unleſs he preſents it for payment when due, and regularly proteſts it for non-payment. *Kyd*, 117, 120, *(76, 79, &c.)* 121, 137, 138, 151, 208.

3d. The defendant had not ſuch notice of the proteſts for non-acceptance and non-payment, as to render him liable.

The caſe of *Brown v. Barry*, 3 *Dallas*, 365, has no relation to this caſe. That was a bill drawn in America upon a perſon in Europe. This is a bill drawn in Europe on a perſon in America, and is therefore ſubject to the laws of the place where drawn and indorſed, as to the liability of the drawer and indorſers. The engagement of Fenwick, the defendant, was made in France, and his liability is to be determined by the laws there. The obligation of the drawer and indorſers is only conditional; the holder muſt do certain things to entitle him to call upon them. *Kyd*, 117, *(76.)* He is bound to give regular notice of non-acceptance to all the preceding parties to whom he means to reſort.

As to the proteſt being for want of funds in the hands of the drawees, it goes only to diſcharge the holder from his obligation to give notice to the drawer, but does not ſuperſede the neceſſity of notice to the indorſer. *Kyd*, 129, 131, (82, 83.) There is reaſon for this diſtinction. A drawer may have a good reaſon for drawing, although he has no effects in the hands of the drawee, but yet no injury can reſult to him by want of notice. But the indorſer may know that the drawer has been in the habit of drawing; but may not know the exact ſtate of the funds upon which he drew.* The endorſer endorſes on the credit of the drawer; and notice is neceſſary to enable him to take meaſures to ſecure himſelf from the drawer.

As to the time of notice—the non-acceptance was on the 30th of March, 1798, and on that day the holder's obligation to give notice, accrued, but he did not give it until January or February, 1801. The act of congreſs did not ſtop the intercourſe between this country and France, until 1ſt July, 1798. There is no evidence that any attempt was made during this time to ſend notice. The bill, in ſeven months, found its way from France to Georgetown, and what prevented its getting back again in ſeven months more? The evidence ſtated in the bill of exceptions ſhews that there was always a circuitous route by which letters and papers might have got to France. There is alſo evidence that the drawer was able to pay for ſome time after the drawing the bill, and that he afterwards left France. Notice muſt be given by the *indorſee himſelf*, *Kyd*, 126, (79, 80.) The only notice which was given in this caſe, was by Judah Hays, who is not a party on the bill.

The court, and not the jury, ought to have decided the queſtion of reaſonable notice, or due diligence. It is a queſtion of law. *Kyd* 126, 127, (79, 80.) Notice muſt be given by the firſt poſt. The courts in Maryland have always ſo decided. If the court have not decided the queſtion of due diligence they have erred. They have alſo erred in the opinion which they did give. They admit that reaſonable notice is neceſſary to enable the plaintiffs to recover upon *the bill* on the firſt count, but that, in caſe the defendant below knew that the drawer had no

* See Evans on bills, 62 and 67, Amer. edition.

FENWICK v. SEARS'S ADMINRS.

funds in the hands of the drawees, it is not neceſſary to prove ſuch notice in order to enable the plaintiffs to recover *on the count for money had and received.* It is not known on what grounds the court below could take ſuch a diſtinction. There was certainly nothing in the evidence which could ſupport ſuch an opinion. If the holder had been guilty of ſuch negligence as to diſcharge the indorſer from his liability upon the bill, he was not entitled to recover upon either count. It was an objection which went to the whole merits of the caſe; and it is not like the caſe where a ſecurity or inſtrument may be vacated, but the debt ſtill remain.

4th. The letters of adminiſtration granted in Maryland did not authorize the plaintiffs to adminiſter aſſets in the diſtrict of Columbia.

The laws of Maryland, which were adopted by congreſs for this diſtrict, do not authorize an adminiſtration of aſſets under letters of adminiſtration granted in another ſtate. And ſuch has been the uniform courſe of deciſions in the courts of Maryland; becauſe, by the teſtamentary laws of Maryland, the adminiſtrator is to give bond, and render an account of his adminiſtration; and the aſſets are to be diſtributed in the manner preſcribed by law.

Although this is the law of Maryland, and the laws of Maryland have been adopted in this diſtrict by congreſs; yet they do not operate as laws of Maryland, but as laws of the United States. And although the law is the ſame, yet the juriſdiction is different. This diſtrict, and the ſtate of Maryland, are to each other as ſeparate ſtates.

Simms, for defendants in error.

1ſt. As to the objection that the notary had not taken the neceſſary oaths.

It is believed that no caſe can be produced to ſupport this exception. It would be extremely inconvenient if the acts of a commiſſioned miniſterial officer, ſhould be conſidered as invalid, becauſe he had neglected to take an oath preſcribed by law.*

* Note. See the caſe of *Thurſtan v. Slatford* in the exchequer, 1 Lutwyche, Rep. 377, 8vo edition, 1618, where it was held that the town clerk

By the act of Assembly of 1779, c. 25, §. 8, a penalty is enacted for not taking the oath there mentioned. This does not make void the acts of the officer, if he neglects to take the oath required, but only subjects him to the penalty, for acting without taking it. From this it may be inferred that the legislature considered his acts as valid.

The court did not err in refusing the evidence offered, because it was an attempt to prove a negative. The oath might have been taken before any judge, or justice of the peace in the state of Maryland, or any alderman in the city of Annapolis. The law does not require such oath to be recorded, or deposited in any particular place. A party can never be called upon to prove that a notary public, who protests a bill of exchange, was duly qualified to make such a protest; consequently the court ought not to admit evidence that he was not, so as to throw the burden of proof upon the other party. There is no penalty prescribed for not taking the oaths required by the constitution of Maryland, and by the act of 1779, but it does not follow from that circumstance, that the acts of the officer, duly appointed and commissioned, would be void by his not having taken the oaths, because he might be indicted and punished for his contempt of the law, and his neglect of duty. Innocent people ought not to suffer by his negligence, especially as they have no means of knowing whether he had taken the oaths or not. The public commission from the proper authority is all that can be required to protect the rights of third persons.

It is true that in the passage cited from *Kyd* 136, (87.) it is said, that "the person whose office it is to do these "acts" (that is make protests, &c.) "is in common lan- "guage, termed a public notary," but it is also said in *Evans* 94, that when there is no public notary in the place, the protest may be made by any other person.

2d. As to the time of making the protest for non-payment.

The time when a protest ought to be made depends much on the custom of the place. 4 *Bac. ab. Guillim's*

clerk of Oxford was entitled to recover his fees accruing, before he had taken the oaths.

FENWICK v. SEARS's ADMINRS.

Ed. 687. The time in England was for a long while unsettled. *In Salk.* 132, *Hill v. Lewis*, it was determined that, with respect to foreign bills, the drawee had three days of grace to pay them in, and that no demand need be made till the *expiration* of the three days, consequently that the protest need not be made till after the third day of grace. But in the case of *Tassel v. Lewis*, *Ld. Ray.* 743, it was held that the time of payment is the last of the three days, and that the demand ought to be made on that day. In a late case of *Leftly, v. Mills*, 4 *Term, Rep.* 173, Ld. Kenyon held that the acceptor had till the last moment of the last day of grace to pay the bill, consequently the protest could not be made till the day after. But Buller held that the acceptor was bound to pay the bill, on demand, on any part of the third day of grace, and that the bill ought to be protested on that day, and it is believed that such is now the established custom in England. *Kyd*, 120, 121, (79, 80.)

But the custom of merchants in the United States differs in some respects from the custom of merchants in England. *Brown v. Barry*, 3 *Dal.* 365, 368. It is believed that, in the United States, the custom is to protest on the day after the last day of grace. Such is the custom in the banks of Alexandria and Columbia, in the case of promissory notes; and no difference is known in that respect between promissory notes and bills of exchange. There is no reason why a difference should exist, as the three days of grace are allowed in one as well as in the other.

But in this case, the bill was protested for non-acceptance and the defendant thereupon became liable to the action of the plaintiff. In an action brought upon the non-acceptance, it is not necessary to aver a demand or protest for non-payment on the day when the bill becomes due; and what it is not necessary to aver, it is not necessary to prove; *Lilly's Ent.* 55, *Dunstar v. Pierce*, which was a case on a demurrer to the declaration; demurrer overruled, and judgment affirmed in the exchequer.

But had the bill been accepted, then a protest for non-payment would have been absolutely necessary. *Evans* 66, *Kyd* 140, *Doug.* 55, *Milford v. Mayer*. *Buller N. P.*

269. *Bright v. Purrier.* *Kyd*, 110, 111. 3 *Wil.* 16, 17.

FENWICK v. SEARS's ADMINRS.

3. Under the circumſtances of the preſent caſe, the plaintiffs were not bound to give the defendant notice at all; the jury having found in ſubſtance, that at the time the defendant indorſed the bill, he knew that the drawer had no effects in the hands of the drawees; and was therefore guilty of a fraud on the plaintiff's inteſtate, in ſelling him the bill. The plaintiffs therefore had a right to recover on the count for money had and received.

Beſides, the reaſon of the rule which diſpenſes with notice to the drawer, when the drawees have no effects, applies as ſtrongly to the indorſer who knows that fact, as to the drawer. Notice to ſuch an indorſer can be of no benefit, becauſe he knew, at the time of indorſing, that the bill would not be paid, and therefore muſt have taken ſecurity from the drawer, or if he did not, it was his own fault. By knowing at the time of indorſing that the drawees had no funds of the drawer in their hands, he virtually had notice of the non-acceptance and non-payment. The rule, which requires notice to an indorſer, is made for his protection and benefit; and ought not to be converted into the means of enabling him to practice a fraud.

The opinion of the court below, that although notice might be neceſſary in order to ſupport an action *on the bill* upon the firſt count, yet it was *not* neceſſary to maintain the count for *money had and received*, was certainly correct, and fully warranted by the caſe of *Bickerdike v. Bellman*, 1 *Term rep.* 408, 409, 410. In that caſe Aſhhurſt, juſtice, ſays that notice is not neceſſary to the drawer when he has no effects in the hands of the drawee; "*for it is a fraud in itſelf*, and if that can be "proved, the notice may be diſpenſed with." *Kyd* 129. (82.) *Evans* 59. Every indorſer is, to his indorſee, as the drawer of a new bill. *Kyd* 113. (72.) 1 *Salk.* 133. *Harry v. Perrit*, 2 *Shower* 501. *Claxton v. Swift*, and in *Heylin v. Adamſon*, 2 *Burr*, 674, Lord Mansfield ſays, "that when a bill of exchange is *indorſed*, by the perſon "to whom it was payable; as between the indorſer and "indorſee, it is a *new* bill of exchange, and the indorſer

FENWICK v. SEARS'S ADMINRS.

"ſtands *in the place of the drawer.*" If, therefore, the indorſer, at the time he transfers a bill, knows that the drawer has no effects in the hands of the drawee, he is as guilty of fraud as the drawer himſelf; and in all caſes where money is obtained from another by fraud of any kind it may be recovered back in an action for money had and received. 2 *Bur.* 1012. *Moſes v. Macferlan.* *Salk.* 28. *Haſſer v. Wallis.* And in the caſe before cited of *Bickerdike v. Bollman.* 1 *Term rep.* 410, Buller, juſtice, ſays, "Beſides, in the preſent caſe, as the plaintiff's counſel "have truly argued, the queſtion is not, whether an ac- "tion could be maintained on the *bill itſelf*, but whether "the want of notice *extinguiſhes the debt.* As to which "the caſe is this, A. not having any effects in C.'s hands, "draws a bill of exchange for £.100 on him, in favour "of B. *for value received.* Now if C. does not accept, "and B. does not give notice to A. there is an end of the "bill. Then how does the caſe ſtand? A. has £.100 of "B.'s in his hands, without any conſideration, which, "therefore, B. may *undoubtedly recover in an action for mo-* "*ney had and received.*"

The reaſoning in that caſe applies exactly to the preſent. Here the defendant Fenwick, by his indorſement of the bill, acknowledges that he has received its amount. He has received of the inteſtate 350 dollars, without any conſideration, and, therefore, even although the remedy *on the bill* might have been loſt, he ought to recover the amount of the conſideration on the count for money had and received.

It is true, that in the caſe of *Goodall v. Dolley.* 1 *Term rep.* 712. it is ſaid that the fact of the drawer's having no funds in the hands of the drawee, would not diſcharge the obligation of the holder to give notice to the *indorſer*, to whom he meant to reſort; yet it is alſo expreſsly ſtated that the indorſer was *ignorant of all the circumſtances of the caſe.* That opinion, therefore, can not affect the preſent caſe in which the indorſer knew the circumſtances.

As to the queſtion whether reaſonable notice is matter of law to be determined by the court, or matter of fact to be determined by the jury: The practice in England, until lately, was for the jury to determine, by the cir-

cumſtances of each particular caſe, what time was reaſonably to be allowed either for making demand or giving notice. *Kyd*, 127. (77.) *Doug.* 515, (497.) *Ruſſel v. Langſtaffe. Doug.* 681. *Ruſhton v. Aſpinall.*

In the caſe of *Tindall v. Brown*, 1 *Term rep.* 167. *Lord Mansfield* ſays, that "what is reaſonable notice is "partly a queſtion of fact, and partly a queſtion of law. "It may depend in ſome meaſure on facts; ſuch as the "diſtance at which the parties live from each other, the "courſe of the poſts, &c. But *whenever a rule can be* "*laid down* with reſpect to this reaſonableneſs, that ſhould "be decided by the court, and adhered to by every one "for the ſake of certainty." *And Aſhhurſt, juſtice*, ſaid it was "of dangerous conſequence to lay it down as a "*general rule*, that the jury ſhould judge of the reaſona-"bleneſs of time. It ought to be ſettled as a queſtion of "law. If the jury were to determine this queſtion in "*all* caſes, it would be productive of endleſs uncer-"tainty."

It appears to have been the opinion of both theſe judges, that there were certain caſes in which it was proper for the jury to determine on the reaſonableneſs of notice; but that in caſes where a rule *can* be laid down, the court ought to decide the queſtion. No certain rule can be laid down, except in caſes where the parties live in the ſame place, or where there is a conſtant and regular communication by poſt between them.

In a much later caſe 2. *H. Blackſtone's rep.* 569, it was determined that what was reaſonable time, muſt depend on the particular circumſtances, and it muſt be always for the jury to determine whether any laches is to be imputed to the plaintiff.

In the caſe of *Mackie v. Davis*, 2. *Waſh.* 231, Carrington, juſtice, ſays "whether due diligence had been "uſed by the aſſignee to recover againſt the obligor would "neceſſarily be a matter in iſſue between the parties, and "would, upon all the circumſtances of the caſe, be de-"cided by the jury."

1. *Dal.* 252, is to the ſame effect. A caſe to the ſame

FENWICK v. SEARS'S ADMINRS.

effect also has been mentioned as having been decided in the circuit court of the United States, in Virginia, by judge Wilson.

The instruction of the court below to the jury, that reasonable notice was necessary to charge the defendant on the first count, was not objected to by the plaintiff's counsel; but the court not having instructed them whether the notice was or was not reasonable, and a general verdict for the plaintiffs having been given, it is to be presumed that the jury thought the notice was reasonable under all the circumstances; and they were certainly competent to decide that question.

The decisions, that notice *must* come only from the indorsee or the holder, have been since over-ruled. *Evans*, 57.

3. As to the letters of administration.

An administrator, in the United States, ought not to be considered precisely in the same point of view as in England.

In England, he is the servant or agent of the ordinary, and acts in his place and stead.

In the United States, he is the representative of the intestate; and all the rights and credits of the intestate are vested in him.

Formerly in England, the goods of an intestate were disposed of by the bishop or ordinary to pious uses. It was not until the statute of 13th *Ed.* 1. *c.* 19, that the bishop or ordinary was compelled to satisfy the debts of the intestate as far as the goods, which came to his hands, would extend.

After this statute, an action might be brought against the ordinary in the same manner as against an executor; but he was not compellable to grant administration until the statute of 31*st*, *Ed.* 3d. *c.* 11.

From this relation between the ordinary and the administrator the power of the latter was necessarily limited

by the jurisdiction of the former. But the act of congress concerning the district of Columbia puts the question out of doubt. By that act, the laws of Maryland are continued in force in this part of the district; of course, all rights acquired under the laws of Maryland remained valid. It was not the intention of congress to divest any rights which had been acquired under those laws. If the separation of the district from Maryland took away the right which the plaintiffs before possessed of taking possession of the property and collecting the debts of the intestate, in this part of the district, under their letters of administration granted in Baltimore county, it would have the same effect upon letters granted by the orphan's courts of Montgomery and Prince George's counties, before the separation, to persons resident in the district, so that their acts, done since the separation, are unauthorized, and they cannot lawfully act until new administration has been taken out from the orphan's court within the district. The inconvenience, expense and oppression of such a construction, are too obvious to admit the supposition that it was within the intention of congress.

These letters were taken out from the proper authority, and at the time, vested a right in the plaintiffs to administer the assets within this part of the district.

C. Lee, on the same side.

1st. As to the letters of administration.

Admitting that letters of administration, granted out of the state of Maryland, will not authorize an administration of assets within the state, yet in this case the letters were granted in Maryland while this district was part of Maryland, before the 1st Monday of December 1800, and did once authorize an administration of the assets here. A right was completely vested in the plaintiffs. The laws of Maryland are as fully in operation in this district as they were or are in the state of Maryland. Congress could not mean to divest rights completely vested.

2d. As to the second bill of exceptions.

It is admitted that Hanson was duly appointed notary, but the objection is that he had not taken the oath. The

FENWICK, v. SEARS'S ADMINRS.

exception is not to the opinion of the court that he was not duly qualified to act; but ſimply that it was not competent for the defendant to give the evidence offered to prove that he had not taken the oaths. The intention of an oath is only to impoſe an additional obligation on the officer. It is a matter between the officer and the government; and generally a penalty is impoſed for not taking it; but the not taking the oath does not make the act void. Suppoſe a member of the legiſlature ſhould not take the oath preſcribed; this would not vacate a law to which he had given his aſſent. Such a doctrine would produce infinite inconvenience. No time is limited for making the objection; and twenty years after an act has been done, it may be offered to be proved that the officer did not take the oath; if the court would do right in refuſing ſuch evidence in that caſe, they were right in refuſing it in the preſent.

3d. The third bill of exceptions is, that the court admitted the proteſt for non-payment to go to the jury, when it was not made in due time.

The action being for non-acceptance, and not on the proteſt for non-payment; it was not neceſſary to produce that proteſt at all. The objection is that it was not made on the *laſt* day of grace, but on the day after.

The cuſtom is different in different countries. From the general practice of the banks, it may be conſidered as the general rule in this country to proteſt on the day after the laſt day of grace.

The proteſt for non-acceptance is not objected to; it was made on the day on which the bill was preſented.

The court only refuſed to give the direction as prayed, but gave no opinion that the proteſt was a good one.

4th. As to the fourth bill of exceptions.

This reccord does not ſtate the whole evidence in the cauſe. It is true it is ſaid that this is all the evidence given of notice; but it does not ſtate what other evidence there might be to excuſe the want of notice. This ex-

ception may be divided into three points; firſt, as to the opinion prayed; ſecond, as to the conduct of the court in not giving an opinion as to part of the prayer, and thirdly, as to the opinion which the court did give.

The prayer is to inſtruct the jury that it was neceſſary to prove notice of non-payment as well as of non-acceptance. The plaintiffs, if any body, had a right to complain of the opinion of the court, in as much as it did not declare notice of non-payment to be unneceſſary. But they have waved their right to except. The opinion given is what is excepted to, and that was given only on the count for money had and received.

The bill and indorſement are ſtated to have been made in France. The law of France then is the *Lex Loci*, by which this cauſe is to be decided, and by which the liability of the indorſer is to be aſcertained. By that law *no* notice is neceſſary to the drawer or *indorſer*, if there are no effects of the drawer, or of the indorſer, in the hands of the drawee. *Evans* 60, 62.

And what is meant by funds, is not ſecurities lodged for raiſing money, upon which the money has not been raiſed; but is money in account. 2 *Eſp. rep.* 515. *Evans* 62.

As to the ground of fraud, the court left it to the jury to decide whether the defendant knew that the drawer had no funds in the hands of the drawees. If he did know it, is it not as much a fraud as in the caſe of a drawer drawing without funds? It is in fact an accumulated fraud. If, according to juſtice Aſhhurſt, one is a fraud, the other muſt be a greater fraud.

As to due diligence, the exception is not that no notice was given, but that it was not given in due time. No doubt but that by the laws in England, due notice is neceſſary as a general rule. But to this there are exceptions.

There is an American law on this ſubject, which is, that in ſome caſes the jury, and not the court, is to decide what is laches. When a particular caſe ariſes, and a variety of circumſtances are given in evidence in ex-

FENWICK v. SEARS'S ADMINRS.

cuſe for not giving notice ſooner, there, by the American practice, the jury are to decide. This appears by the deciſions in Pennſylvania down to the year 1795. 1 *Dallas, Robertſon v. Vogle.* 2 *Dal.* 158. *Bank of N. America v. M'Knight.* 2 *Dal.* 192. 233. 1 *Call's rep.* 123. *M'Williams v. Smith.*

In this country the line is more diſtinctly drawn between court and jury than it is in England. By the 9th article of the amendments to the conſtitution, a matter once tried by a jury ſhall not be otherwiſe re-examined than by a jury according to the rules of the common law. If the court now make a rule as to what is due diligence in this caſe, they will without a jury try a fact which has once been decided by the jury in the court below.

If the queſtion involve matter of fact with the law, the jury *muſt* decide the facts; and it is no error in the court to ſuffer them to decide the law alſo at the ſame time.

When a rule can be laid down, then the court is to ſtate the rule. But where that can not be done then it may be left to the jury. This is all that lord Mansfield ſays in in the caſe of *Tindall v. Brown.*

5th. The fifth is an exception to the opinion which the court gave, and not to the conduct of the court in not giving an opinion. The opinion given was againſt the plaintiffs below, and they alone had a right to except to it.

There was a deciſion of chief juſtice Jay, given upon the circuit, ſimilar to that given by judge Wilſon, that the jury and not the court were to judge of the validity of excuſes for giving notice.

The judgment ought not to be reverſed becauſe the court below did give an improper inſtruction to the jury.

It is hoped that the court will decide the queſtion of notice as it is of great importance that a general rule ſhould be eſtabliſhed and underſtood.

Maſon in reply.

1ſt. As to the letters teſtamentary.

Antecedent to the revolution the teſtamentary affairs in the ſtate of Maryland were under the ſuperintendance of a commiſſary general, who had a deputy in each county. If there were *bona notabilia* in ſeveral counties, the adminiſtration was granted by the commiſſary general. But if the goods of the inteſtate were all in one county it might be granted by the deputy commiſſary of that county. By the new ſyſtem of teſtamentary laws, 1798 ch. 101. § 3. the aſſets in Maryland connot be adminiſtered but by letters of adminiſtration granted in Maryland.

In the diſtrict of Columbia, if a man now die inteſtate, the adminiſtration muſt be granted in the diſtrict.

The laws of Maryland do not operate in the diſtrict as laws of Maryland, but as laws of the United States. Their obligatory force is not derived from the ſtate of Maryland, but from the United States.

Does the fact that the letters were granted before the ſeparation of the diſtrict from Maryland, make any difference? If any right had veſted, what was it? Was it a right to ſue Fenwick who was then in France, and who came to the diſtrict after its ſeparation.

But no right at all had veſted in the plaintiffs. If the ſeparation had not taken place, and Fenwick had come, they might have ſued; but as it had taken place before he came, they can not.

By the laws of this part of the diſtrict, the adminiſtrator muſt give bond duly to adminiſter the eſtate, and to pay the debts *pari paſſu*. He muſt advertiſe in a certain manner, &c. The only evil reſulting from this conſtruction of the law is, that plaintiffs muſt take out letters of adminiſtration here.

2d. As to the ſecond bill of exceptions. The queſtion is, whether Hanſon was a notary before he took the oath

FENWICK v. SEARS'S ADMINRS.

prescribed by the law of 1779. The constitution says, that before he enters upon the execution of the duties of his office he shall take the oath of allegiance. The law of 1779 says, he shall take the other oath therein prescribed, and if he acts without having taken it he shall be subject to a penalty. The constitution and the law are to be coupled together, and then the taking the oath prescribed by the act of 1779, becomes a pre-requisite to his capacity to act as notary.

3d. The third bill of exceptions is that the protest for non-payment was not a proper one to go to the jury. It was not in itself evidence. It is no answer to say that no protest for non-payment was necessary; the counsel below did not chuse to risk their cause without it. If the opinion of the court is erroneous, and if the protest was improperly admitted to go to the jury, the judgment must be reversed. It may be a good reason why the court should refuse to let it go to the jury, that it was not necessary. It is therefore unimportant to decide whether it was necessary or not. But that it was necessary appears in *Kyd*, 120, 137, 138, *(77, 87.)*

As to the case of the notary who refused six pence for noting the bill, 4 *Term rep.* 173. It is the opinion of lord Kenyon only, that the acceptor had till the last moment of the last day of grace to pay the bill; and that was the case of an *inland* bill, and decided expresly upon the statute of *William*. But Buller states the law to be otherwise on a *foreign* bill, and that, by the custom, the bill is payable at any reasonable time of the last day of grace when demanded. And the law is so stated in *Kyd*, 121, *(78.)* The practice in Alexandria may be as stated, but in Baltimore they protest on the 3d day, in banking hours. There is a difference between the law respecting inland and foreign bills; and this difference arises from the statute of *William*, which gives the protest on inland bills and requires it to be made *after* the expiration of the three days, *Kyd*, 151, *(91.)* It is upon this statute, which is in force in Maryland, that the banks have adopted the practice of protesting promissory notes on the day after the expiration of the three days of grace. A promissory note as soon as it is indorsed becomes an inland bill of exchange.

4th. It is objected to the fourth bill of exceptions that it does not contain the whole evidence. But if a bill of exceptions ſtates evidence, it has been decided by this court that it is preſumed to ſtate the whole evidence. 3 *Dal.* 19, 38, *Bingham v. Cabott.*

It is ſaid that the exception is not to the refuſal of the prayer, but to the opinion which was given. If the opinion prayed was correct, and the court refuſed to give it, or, by being divided, failed to give the inſtruction to the jury as prayed, it is error. The court will diſregard the inaccurate form of words, and come at the ſubſtance of the exception.

As to the want of funds in the hands of the drawees, the court are to preſume that the whole evidence is ſtated in the exception. We deny the principle that ſuch funds can be only money in account. There was reaſon for Fenwick to believe that the drawees had funds, and he ought therefore certainly to have had notice. There is not the leaſt ground for a ſuſpicion of fraud in Fenwick.

As to the count for money had and received, it is a common law count; but upon that count the plaintiffs can not recover by means of evidence reſulting from that bill, unleſs they have done every thing to entitle them to recover upon the bill itſelf, by uſing due diligence, giving due notice, &c.

It is ſaid that the *indorſement was made in France*, and therefore the law of France is to decide the reſponſibility of the indorſer; and that by that law notice is not neceſſary to the indorſer, if neither the indorſer nor the drawer has funds in the hands of the drawee; and Evans is cited as the authority. It is doubted whether Evans is correct in that poſition; but whether correct or not, it does not apply, becauſe the money was to be paid here, and the contract is perſonal. If Fenwick had been ſued in France it might have applied; but being ſued here, the law of this country muſt decide his caſe.

As to the queſtions what is due notice, and whether it be a matter of fact or of law, the deciſions cited from Dallas are no authorities in this caſe. They all turned

FENWICK v. SEARS'S ADMINRS.

upon the laws of particular ſtates. This court is to be governed by the law of the place where the tranſaction happened, unleſs where the laws of the United States apply. The court in this caſe are to decide by the laws as they exiſt in Maryland; and there the laws of England reſpecting bills of exchange and promiſſory notes have always been the rules of deciſion. We are not in Maryland to be governed by whimſical opinions drawn from either Pennſylvania or Virginia. Virginia has not been remarkable for her progreſs in commerce; and were I to form a ſyſtem of commercial law, I ſhould certainly not draw it from the fantaſtical opinions adopted in either of thoſe ſtates.

In England, what is due notice has been and is ſettled and determined to be matter of law to be decided by the court.

On the 25th of February, *The Court* gave the following judgment.

"It is decreed by the court that the defendants Stricker "and Payſon, *not having obtained letters of adminiſtration "in the diſtrict of Columbia*, were not competent to main- "tain this action; and that the circuit court of the "United States in and for the ſaid diſtrict erred in over- "ruling the demurrer. It is therefore conſidered by the "court, that the judgment of the ſaid circuit court, on "the ſaid demurrer, be, and the ſame is hereby reverſed, "and that judgment thereon be rendered for the defend- "ant in the original action."*

THOMPSON *v.* JAMESON.

THOMPSON v. JAMESON.

ERROR from the circuit court of the diſtrict of Columbia, ſitting in Alexandria.

An action of debt for £ 860 12 1, founded on a decree in

*The reporter was not in court when this judgment was entered, but he has underſtood that the court did not aſſign the reaſons upon which their opinion was grounded; and gave no opinion upon the other points. *See Evans on bills*, 57, 63, 69, 70, & 71, *as to notice.*

THOMPSON v. JAMESON.

Thompſon, in the year 1795, being indebted to Hadfield, a perſon reſiding out of the juriſdiction of the commonwealth of Virginia, and Hadfield being indebted to Jameſon and Brown as partners in merchandize, the latter obtained from the county court of Fairfax an attachment in chancery, in the nature of a foreign attachment, to ſtay the effects of Hadfield in the hands of Thompſon, under an act of aſſembly of Virginia, entitled "An act directing the method of proceeding in "courts of equity againſt abſent debtors, or other abſent "defendants, and for ſettling the proceedings on attach-"ments againſt abſconding debtors." *Reviſed code, p.* 122, *ch.* 78. This act directs, "that if in any ſuit which "hath been or hereafter ſhall be commenced for relief in "equity, in the high court of chancery, or in any other "court, againſt any defendant or defendants who are out "of this country, and others within the ſame, having "in their hands effects of, or otherwiſe indebted to, ſuch "abſent defendant or defendants, and the appearances of "ſuch abſentees be not entered, and *ſecurity given*, to the "ſatisfaction of the court, *for performing the decrees*; up-"on affidavit that ſuch defendant or defendants are out "of the country, or that upon enquiry at his, her, or "their uſual place of abode, he, ſhe, or they could not "be found, ſo as to be ſerved with proceſs; in all ſuch "caſes the court may make any order, and require ſure-"ty, if it ſhall appear neceſſary, to reſtrain the defend-"ants in this country from paying, conveying away, or "ſecreting the debts by them owing to, or the effects in "their hands, of ſuch abſent defendant or defendants; "and for that purpoſe may order ſuch debts to be paid, "and effects delivered, to the ſaid plaintiff or plaintiffs, "upon their giving ſufficient ſecurity for the return there-"of, to ſuch perſons, and in ſuch manner, as the court "ſhall direct." It further provides, that the court ſhall appoint ſome day in the ſucceeding term, for the abſent defendant to enter his appearance, *and give ſecurity for performing the decree*; and ſhall order notice to be publiſhed, &c. and if the abſent debtor ſhall not appear and *give ſuch ſecurity*, within the time limited; the court may proceed to take ſuch proof as the complainant ſhall offer; and if they ſhall thereupon be ſatisfied of the juſtice of the demand, they may order the bill to be taken as confeſſed, and make ſuch order and decree therein as to them ſhall ſeem juſt, and may enforce due performance thereof, &c.

chancery, is not ſupported by a decree for £. 360 12 1 *with intereſt from a certain day to the day of rendering the decree.* But the variance is fatal. Upon an attachment in chancery under the laws of Virginia, the record ſtated that "*I. T. in open court became ſecurity that I. H.* (the abſent debtor) *ſhall perform the decree of this court if againſt him.*" Quere Whether an action of debt will lie againſt I T. for the amount decreed againſt I. H.?

THOMPSON v. JAMESON.

In the record of that case in Fairfax county court, it is stated, "that at a court continued and held for the said "county, on the 18th day of June, in the year last men- "tioned, came the complainants aforesaid, by their attor- "ney, and thereupon Jonah Thompson, in open court, "*became security that the said Joseph Hadfield shall perform* "*the decree of this court, if against him*; and on motion of "the said defendant, Joseph Hadfield, by his attorney, "the attachment is discharged as to the effects in the hands "of the other defendants." The court, at a subsequent term, on the 19th of November, 1799, decreed, that "it "having appeared to the satisfaction of the court, that "the complainants bill hath been duly taken for confes- "sed, after his appearance by attorney, and giving secu- "rity for performing the decree against him, the court "doth adjudge, order, and decree, that the complainants "do recover against the said Joseph Hadfield, the sum "of eight hundred and sixty pounds, twelve shillings "and one penny, sterling, (to be settled in Virginia cur- "rency, at the rate of twenty per cent. exchange,) to- "gether with interest on the same, at the rate of five "per cent. per annum, from the 8th day of March, 1795, "*until the day of pronouncing this decree*, and also *his costs* "by him expended in the prosecution of his bill here."

Hadfield having failed to perform this decree, and Brown, the partner of Jameson, being dead, Jameson brought the present action of debt in the circuit court of the district of Columbia, against Thompson, founded upon his responsibility as security for Hadfield's performing the decree. The declaration was "of a plea that he ren- "der unto him the sum of eight hundred and sixty pounds, "twelve shillings and one penny, sterling, of the value "of one thousand and thirty-two pounds, fourteen shil- "lings and six pence, Virginia currency, equal to three "thousand, four hundred and forty-two dollars, and for- "ty-one cents, United States currency, which to him he "owes, and from him unjustly detains; for this, that "whereas," &c. setting forth the substance of the pro- ceedings on the attachment in Fairfax county court, "and "whereas afterwards, that is to say, at a court held for "the said county of Fairfax, on the 18th day of June, "1795, at the county aforesaid, *the said Jonah, in open* "*court, became security that the said Joseph would perform* "*the decree of the said court in the said suit, if against him.*

"In which ſaid ſuit ſuch proceedings were had, that the "ſaid court of the county of Fairfax, on the 19th day "of November, that is to ſay, at the county of Alexan- "dria aforeſaid, did adjudge, order and decree, that the "ſaid Robert B. Jameſon and co. ſhould recover from "the ſaid Joſeph, the ſaid ſum of £. 860 12 1, ſterling, "(to be ſettled in Virginia currency, at the rate of twen- "ty per cent. exchange,) *together with intereſt* on the ſame, "at the rate of 5 per centum per annum, from the 8th "day of March, 1795, *until the day of pronouncing the "ſaid decree*, and alſo their coſts by them expended in "the proſecution of the ſaid bill. All which by the re- "cord thereof, now remaining in the office of the coun- "ty court of Fairfax, will more fully and at large appear. "And the ſaid Robert B. Jameſon, in fact avers, that "the ſaid Joſeph has not in any manner performed the "decree of the ſaid court of Fairfax county, in the cauſe "aforeſaid made, in this, that he has not paid to the ſaid "Jameſon and co. in the life time of the ſaid Brown, "nor to the ſaid Jameſon, who has ſurvived the ſaid "Brown, the ſaid ſum of £. 860 12 1 ſterling, or the "value thereof in Virginia currency, at the rate of ex- "change in the ſaid decree mentioned, *with intereſt there- "on as awarded by the ſaid decree*; which ſaid decree, in "form aforeſaid, yet remains in full force and effect, not "reverſed or ſatisfied; by reaſon whereof, *action accrued* "to the ſaid Jameſon and co. to demand and have from "the ſaid Jonah, *the ſaid ſum of £. 860 12 1, ſterling, of "the value aforeſaid.* And the ſaid Jameſon further avers, "that the ſaid Brown, on the day of in "the year departed this life, to wit: at the county "of Alexandria aforeſaid, whereby the ſaid cauſe of ac- "tion ſurvived to the ſaid Jameſon. Nevertheleſs, the "ſaid Jonah *the ſaid ſum of £. 860 12 1, ſterling, of the "value aforeſaid*, or any part thereof, to the ſaid Jameſon "and co. in the life time of the ſaid Brown, or to the "ſaid Jameſon, ſince his death, has not paid, &c. to the "damage of the ſaid Jameſon *five hundred dollars*, and "therefore he brings ſuit," &c.

There was an office judgment at the rules in Novem- ber, 1801, which was not ſet aſide at the next ſucceeding court in January, 1802. At April term, 1802, the de- fendants counſel moved to ſet aſide the office judgment on

THOMPSON v. JAMESON.

pleading *nil debet*. The court being divided on the propriety of that plea to an action founded on the record of a court of one of the ſtates, the plea was not received, and a bill of exceptions was taken by the counſel for the defendant and ſigned by the judge who was againſt the admiſſion of the plea. The pleas of *nul tiel record and payment* were then filed and iſſues made up, on which the cauſe went to trial. The verdict upon the iſſue of payment was in theſe words, "we of the jury find for the "plaintiff the debt in the declaration mentioned, and one "cent damages, to be diſcharged by the payment of two "thouſand, five hundred and forty four dollars, forty nine "cents."

And the defendant moved in arreſt of judgment for the following reaſons,

1ſt. Becauſe the action is brought for ſterling money, when it appears by the plaintiff's own ſhewing in the declaration, that the original ſterling debt has been changed by the decree of the county court of Fairfax, into the current money of Virginia.

2d. Becauſe the plaintiff, in his declaration, declares for a ſterling debt, and lays his damages in current money.

3d. Becauſe the jury have found their damages in current money, and have fixed the ſum in current money, at which the ſaid ſterling debt might be diſcharged.

4th. Becauſe it doth not appear by the plaintiff's declaration what was the nature of the defendant's undertaking as ſecurity, whether it was by record, by bond, or by parols.

5th. Becauſe the whole proceedings are irregular informal and erroneous.

Theſe reaſons not being deemed ſufficient by the court below, judgment was rendered for the plaintiff for "£.861. "12. 1. ſterling, of the value of £.1032. 14. 6. Virginia "currency, equal to three thouſand, four hundred, forty "two dollars and forty one cents, United States currency,

" *the debt in the declaration mentioned*, and one cent dama-
" ges, by the jurors aforeſaid, in form aforeſaid aſſeſſed,
" and alſo his coſts by him about his ſuit in this behalf
" expended, and the ſaid defendant in mercy, &c. But
" this judgment (damages and coſts excepted,) is to be
" diſcharged by the payment of 2544 dollars and 49
" cents."

To reverſe this judgment, the defendant below ſued out the preſent writ of error.

Swann, for plaintiff in error.

E. J. Lee, and Key for defendant.

Swann.

1ſt. The declaration does not ſhew any obligation on Thompſon, upon which this or any other action will lay.

2d. If it does, it is not ſuch an one as will ſupport an action of debt.

3d. If an action of debt will lay, ſtill this action will not, becauſe it is brought for part of the debt only.

4th. The action is brought for ſterling money, whereas it ought to have been brought for Virginia currency.

5th. If properly brought for ſterling money, the court below ought to have rated the exchange.

1ſt. The record ſimply ſtates, that " the ſaid Jonah " (Thompſon) *in open court became ſecurity*;" but does not ſtate how; whether by bond, by parol, or by matter of record. It is only a record declaration that he became ſecurity.

2d. The record ſtates, that he became ſecurity that *Hadfield* would perform the decree of the court, if againſt him; and not that Thompſon would pay the debt, or that he undertook to pay any ſum of money whatever. Nor does it ſtate that he became bound in any particular ſum. It does not ſtate that he undertook to pay the debt

THOMPSON v. JAMESON.

if Hadfield did not. There is nothing to support an action of *debt*. It is, if any thing, a collateral undertaking; and if any action will lay, it must be covenant. To support an action of debt, there must be a direct obligation on the part of the defendant, moving to the plaintiff, to pay a *certain* sum, or a sum which may be rendered certain.

3d. The declaration is for £.860. 12. 1. sterling of the value of £. 1032. 14. 6. Virginia currency, equal to 3442 dollars and 41 cents, United States currency. This is not the whole debt due by the decree. You must sue for the *whole* debt, or if you sue for a part, you must state the residue to be satisfied.

The decree of the court of Fairfax was rendered on the 19th of November, 1799, and was, that the complainants recover against Hadfield the sum of £.860. 12. 1. sterling, (to be settled in Virginia currency at the rate of 20 per cent. exchange) *together with interest on the same at the rate of 5 per cent. per annum from the 8th of March*, 1795, *until the day of pronouncing that decree, (19th November,)* 1799, and also *his costs* by him expended in the prosecution of his bill. The debt was composed of the principal sum reduced to Virginia currency at 20 per cent. exchange, and interest thereon at 5 per cent. per annum, calculated from 8th of March, 1795, to the 19th of November 1799, and costs. But the declaration is only for the principal. It is therefore only for a part of the debt, and does not state the residue to be satisfied. A debt cannot be divided, and the reason of the law is, that a multiplicity of actions may be prevented. 3 *Modern* 41. *Marsh v. Cutler. Cro. Iac.* 498, 499, *Pemberton v. Shetton.*

4th. The debt was originally due from Hadfield in sterling money, but the debt due by the decree is a current money debt. The decree has changed it from sterling to currency.

It is an express command that it shall be settled in current money, at a certain rate. It is no longer a sterling debt. If an action of debt will lay for it, it must be laid as a debt due in Virginia currency.

5th. But if it is a sterling debt, then the court below, ought, under the act of the Virginia assembly *(revised code,*

p. 121. ch. 77. § 6.) to have fixed the rate of exchange. The verdict ought to have been simply for the sterling debt and damages; but the jury have gone on and said that the debt should be discharged by the payment of 2544 dollars and 49 cents; and the court have rendered judgment in the same manner, without fixing the rate of exchange.

6th. The declaration states the decree to have been made on the 19th of November, but does not say in what year. This omission was fatal on the plea of *nul tiel record.*

E. J. Lee, for defendant in error.

1st. The record states the obligation of Thompson in the very words of the act of Assembly. It is the highest obligation which he could have entered into. It is an acknowledgment on record, and is stronger than his bond. Its meaning is evident from the intention of the act of Assembly; and is simply this, that Hadfield should pay the money decreed to be due, and if he did not, that Thompson would pay it for him.

2d. To the objection that this is not such an obligation as will support an action of debt, the answer is, that it is in the nature of a recognizance in chancery, and an action of debt will lie on such a recognizance, 1 *Esp. N. P.* 216.

3d. The case in 3. *Mod.* does not apply to the present. There the action was upon a judgment. Here it is upon the obligation or recognizance of Thompson. We have declared for as much as was due from Hadfield and no more. The obligation of Thompson was to pay what Hadfield should fail to pay. Our action is for this. The record of Fairfax court, which is made part of the declaration, shows how the residue was discharged.

4th. The court of Fairfax did not convert the debt into Virginia currency. They only fixed the principles on which the exchange should be made. The decree is for sterling to be discharged in current money at a certain rate of exchange.

THOMPSON v. JAMESON.

5th. It is the province of the jury and not of the court to fix the value of ſterling money. 1. *Waſh.* 373. 378. *Barnet and al. v. Watſon and al.*

6th Although the year of the decree is not ſtated in the declaration, yet enough is ſtated to render it certain.

Key was to have argued on the ſame ſide, but on examination of the record of the decree in Fairfax, and comparing it with the declaration; and finding the decree to be for £.860. 12. 1. ſterling with intereſt from a certain day *to the day of paſſing the decree*, and the declaration being only for the *principal*, he conſidered the variance as fatal. He had not before noticed accurately the words of the decree, but had ſuppoſed the intereſt did not ſtop at any certain day, but was, by the decree, to run till the time of payment. He did not underſtand that this point had been made in the court below, and therefore had not before examined the record with a view to it.

The court gave no opinion upon the other points, but conſidering this variance as fatal,

Reverſed the judgment.

The chief juſtice obſerved, that there was no clauſe in the declaration ſtating that Thompſon undertook to pay if Hadfield did not, and therefore an action of debt would not lay.

MANDEVILLE AND JAMESON

v.

JOSEPH RIDDLE AND CO.

MANDEVILLE & AL. v. RIDDLE & AL.

In Virginia, an indorſee of a promiſſory note can not maintain an action againſt a *remote* indorſer, for want of *privity*.

ERROR from the circuit court of the diſtrict of Columbia ſitting at Alexandria, in an action on the caſe brought by the defendant in error for *money had and received*, which was the only count in the declaration; and to which the defendant pleaded the general iſſue.

The evidence offered and admitted to support the declaration was a promiſſory note made by Vincent Gray, dated at Alexandria on the 2d of March 1798, by which he promiſed to pay ſixty days after date to the order of Mandeville and Jameſon 1500 dollars for value received, negotiable at the bank of Alexandaia. This note was indorſed by Mandeville and Jameſon to James M'Clenachan, and by him to Joſeph Riddle and co. the defendants in error. The proteſt of a notary public made on the fifth May 1798, atteſting that he had on that day demanded payment of the note of the maker, who refuſed, and of Mandeville and Jameſon the firſt indorſers, who alſo refuſed, and that James M'Clenachan the other indorſer did not dwell in his diſtrict. The record of a ſuit on the ſame note brought by Joſeph Riddle and co. on the 14th of June 1798, againſt Vincent Gray, the maker, proſecuted to final judgment and execution, upon which execution he was committed to jail and took the oath of an inſolvent debtor and was diſcharged, on the 6th of February 1799.

The preſent action was commenced in July 1801.

A bill of exceptions was taken by the defendants below, ſtating theſe facts, and that they prayed the opinion of the court,

1ſt. Whether, this action could be ſuſtained by the preſent "plaintiffs againſt the preſent defendants, there be-"ing *an intermediate indorſer between them*," and,

2dly. "Whether if the ſaid action is ſuſtainable, the "ſaid evidence is admiſſible upon a *ſingle count for money* "*had and received*;" and that the opinion of the court below was that the action might be ſuſtained, notwithſtanding the intermediate indorſer; and that the evidence was admiſſible upon the ſingle count for money had and received. Verdict and judgment for the plaintiffs for 1919 dollars and coſts, to reverſe which, the defendants below ſued out the preſent writ of error.

E. J. Lee and Swann, for plaintiffs in error.

Simms, for defendants.

MANDEVILLE & AL. v. RIDDLE & AL.

E. J. Lee.

1ſt. The action of *indebitatus aſſumpſit* will not lay for the holder againſt a remote indorſer, becauſe there is no privity of eſtate or privity of contract. It is an action at common law; and by the common law no action of *indebitatus aſſumpſit* for money had and received will lay except between privies. *Kyd.* 175. *(113, 114)*

2d. There being only one count in the declaration, and that being only for money had and received, the note ought not to have been given in evidence, becauſe it muſt have been a ſurpriſe to the defendants. In England it is uſual to give notice of the plaintiffs real ground of action either by a ſpecial count, or by a formal notice. The defendants could not come prepared to defend the action. The action for money had and received is ſaid to be in the nature of a ſuit in equity. But here the defendants were in a worſe ſituation, than if a bill in chancery had been filed againſt them; for in that caſe the bill muſt have ſtated the grounds of the claim and ſhown the equitable circumſtances which entitled the plaintiffs to recover.

A remote indorſer is liable to the holder only upon the cuſtom of merchants, and therefore there ought to have been a ſpecial count ſtating the cuſtom.

The Engliſh ſtatute of Anne reſpecting promiſſory notes is not in force in Virginia; and the act of aſſembly which ſupplies its place only allows an aſſignee to bring an action of debt in his own name againſt the maker of the note, but gives no remedy againſt the aſſignors. Hence it reſults that the remedy of the aſſignee againſt the aſſignors is either at common law or under the cuſtom of merchants. By the common law the action of *indebitatus aſſumpſit* lies only between privies; and here is no privity. And if reſort be had to the cuſtom of merchants; that cuſtom muſt be averred in the declaration.

Simms, contra.

Every indorſer is as the maker of a new note. 1 *Strange*, 479, *Smallwood v. Vernon.* *Eſp.* N. *p.* 33. 2 *Bur.* 674,

Heylin v. Adamſon. He undertakes to pay the ſum mentioned in the note, if the original maker does not. As ſoon as the original maker fails to comply with his engagement, that of the indorſer becomes abſolute. He then becomes the holder of ſo much money as is expreſſed in the note, to the uſe of his immediate indorſee, or of ſuch perſon as *he* ſhall name.

It is true the plaintiffs below have ſought their remedy at common law; and by common law they are entitled to recover. Every man ought to be compelled to pay money which he has in his hands belonging to another, and which in equity and good conſcience he has no right to retain. And the principle is now well eſtabliſhed that at common law he may be compelled to pay it, by an action for money had and received.

As to the evidence offered on this count, it was long doubted, before the ſtatute of Anne, whether *any other* than an action of *indebitatus aſſumpſit* for money had and received, or for money lent, would lay upon a note. This was the ground of contention between lord Holt and the merchants of Lombard ſtreet; he ſtrenuouſly contending that the action for money had and received, or for money lent, was the only proper remedy; and they endeavoring to bring into uſe the form of declaring upon a note as a ſpecialty. Although a note may now, under the ſtatute, be declared upon as a ſpecialty, yet the ſtatute has not taken away the common law remedy which exiſted before.

As to ſurprize, the objection made would go to almoſt every caſe where money had and received is the proper action, ſuch as where the conſideration happens to fail, or where money has been paid by miſtake, &c.

Indorſement is evidence that the indorſer has received money of the indorſee. And at and from the time of the indorſement, the indorſer is debtor to the indorſee, and the debt may be proved under a commiſſion of bankruptcy againſt the indorſer before the note is payable.

In this caſe however there could be no ſurprize, the defendants below had notice of the non-payment of the note and that they would be held liable; and it is imma-

MANDEVILLE & AL. v. RIDDLE & AL.

terial by what means notice is given. *Doug.* 138, *Longchamp v. Kenny.*

In the case of *Grant v. Vaughan*, 3. *Bur.* 1516, the cases upon promissory notes before the statute of Anne are taken up and considered with great clearness and ability by the court. Every principle established that case furnishes an argument for the original pl..intiffs in this. The case there was, that Vaughan drew a check or order on his banker in these words (" *pay ship Fortune or bearer* " *£.*70.") and gave it to Bicknell, who lost it. It was found by some person, and honestly taken in payment for goods by the plaintiff, in his way of trade as a mercer. Payment of the check being stopped at the bankers, the plaintiff brought suit against Vaughan the drawer, and declared upon an inland bill, and for money had and received to his use. It was held that these notes are, by law, negotiable *and were so before the statute of Anne*, and that the bearer of them might maintain an action *as bearer*, where he could entitle himself to them on a *valuable consideration*, and for this was cited *Hinton's case*, 2 *Shower* 235, in the reign of Charles 2d.

Crawly v. Crowther, 2 *Freeman* 257, in the year 1702, before the statute of Anne.

1. *Salk.* 126 *pl.* 5. *Anonymous*, 10*th Will.* 3*d.* *And Miller v. Race*, 1. *Bur.* 452. 31 Geo. 2.

That the only dispute before the statute of Anne was as to the mode of *declaring*: but that it never was disputed " that an action upon an *indebitatus assumpsit* generally for " money lent, might be brought upon a note payable to " one *or order*;" and cites 2*d lord Ray*, 758, *Clerke v. Martin.* " That upon the second," lord Mansfield said, " the " present case is *quite* clear, *beyond all dispute.* For un- " doubtedly, an action for money had and received to the " plaintiff's use, may be brought by the *bona fide bearer* of " a note made payable *to bearer.* There is *no* case to the " contrary. It was certainly money received for the use " of the *original advancer* of it; and if so, it is for the use " of the person, who has the note *as bearer.*"

And Wilmot, justice, said, that it was notorious, that such notes were in *fact and practice negotiated.* " Proba-

" bly, the jury took upon themſelves to conſider, whether " ſuch bills or notes as this is, were in *their own nature* " *negotiable*; but this is a point of law; and by law, they " *are* negotiable." And again he ſays, " but this is a " *negotiable* note; and the action may be brought in the " name of the *bearer*. *Bearer* is *deſcriptio perſonæ*; and " a perſon may take by *that* deſcription, as well as by any " other. In the *nature of the* contract, there is no impro- " priety in his doing ſo. It is a contract to pay the bearer, " or to the perſon to whom *he* ſhall deliver it, (whether it be " a note or a bill of exchange;) and it is *repugnant* to the " *contract*, that the drawer ſhould object that the bearer " has no right to demand payment from him. The *rea-* " *ſons* given in the caſes that are oppoſite to this are alto- " gether unſatisfactory." Even *before* the ſtatute of 3 and " 4 Anne, lord chief juſtice Holt himſelf thought, that an " *indebitatus aſſumpſit* for money *lent*, or for money *had and* " *received*, might be maintained upon ſuch a note."

And Yates, juſtice, ſaid " Nothing can be more *peculi-* " *arly* negotiable than a draught or bill payable to *bearer*; " which is, *in its nature*, payable from hand to hand, *toties* " *quoties*." It had been doubted, it is true, whether that " *ſpecies* of action, where the plaintiff declares upon *the* " *note itſelf* as upon a *ſpecialty*, was proper; *but here is a* " *count upon a general indebitatus aſſumpſit, for money had* " *and received to the plaintiff's uſe*. The queſtion, whether " he can maintain *this* action, depends upon its be- " ing *aſſignable*, or not The *original advancer* of the " money manifeſtly appears to have had the money in the " hands of the drawer, and therefore *he* was certainly " entitled to bring *this* action. And if he *transfers* his " property to *another* perſon, that *other* perſon may alſo " *maintain* the like action. *Whoever* has money in the " hands of another may bring ſuch an action againſt him. " This appears from the determination in the caſe of *Ward* " *v. Evans*, reported in 2 *lord Ray*, 930; where not a " *ſhilling of money had paſſed between the plaintiff and defen-* " *dant*; and yet Holt and Powell both held that an *inde-* " *bitatus aſſumpſit* for monies received to the plaintiff's " uſe, properly lay."

This caſe clearly ſhews, that actions upon promiſſory notes payable to bearer, or order, might have been main-

MANDEVILLE & AL. v. RIDDLE & AL.

tained before the ſtatute of Anne; and that ſuch actions did not depend upon the *privity* of contract. There certainly is not more privity of contract between the drawer of a note, and the *bearer*, (eſpecially after that note has been loſt by the lawful owner, and comes to the hands of the plaintiff through the *finder*) than between the maker of a note payable to order, and the indorſee. It alſo ſhows, that there are certain inſtruments, which are negotiable *in their own nature by force of the contract itſelf*, independent of ſtatute law; and that a *promiſee* may as well be deſcribed by being the bearer of a certain paper, as by being named with his chriſtian and ſurname. And if he may be deſignated by the fact of being the bearer of a paper, there is no reaſon why he may not equally be deſcribed by the fact of his being the nominee of a certain other perſon, and the holder of a certain note.

There is no doubt that before the ſtatute of Anne notes were paſſed from one to another, and actions for money had and received were, on common law principles, maintained by the bearers and indorſees. The indorſement was conſidered as conveying or aſſigning the money of the payee in the hands of the maker; and the original contract of the maker was, to hold the money to the uſe of the payee or of ſuch perſon as he ſhould appoint. Privity of contract is not the ground of the action for money had and received. And among the many caſes of that kind, there will be ſcarcely found one in which ſuch a privity has exiſted. If I loſe money, I may have this action againſt the finder. If A. delivers money to B. to be paid over to C. the latter may maintain this action againſt B. If a man, under pretence of authority from me, receive money due to me, I may recover it of him in this form of action. So if I pay money to another by miſtake. So if a man obtains money from me by fraud and deceit. So if the conſideration of a bargain fail. So if one pretending to a right to an office receive fees, the rightful officer may, by an action for money had and received, recover of him the amount of fees ſo received.

The indorſer is a new drawer as to all the ſubſequent parties. He has received money from his indorſee which he engages to hold to *his* uſe, or to the uſe of ſuch perſon as he ſhall appoint, in caſe the maker does not pay

the note on demand. This principle results from the cuſtom of merchants; for the moment a promiſſory note payable to order, is indorſed, it becomes, *in its nature*, independent of any ſtatute, an inland bill of exchange, both in form and ſubſtance. The indorſer orders the maker to pay to the indorſee, or his order, the ſum of money mentioned in the note. The maker by ſigning the note acknowledges that he has effects of the payee, to the amount of the note, in his hands; and by making the note payable to the order of the payee, he authorizes the payee to draw upon him for that amount, and pledges himſelf to honour the draft. An acceptance may be *made before the bill* is iſſued, and is equally binding as if made after. *Kyd.* 48. 49. The ſignature of the maker to the note is an acceptance of the payee's bill. No part or circumſtance of a bill of exchange is wanting.

The plaintiffs below therefore were clearly entitled to recover the money from the defendants; and therefore the defendants ought not in juſtice and good faith to withhold it. In ſuch a caſe there never has been a doubt but that the bill may be given in evidence on the count for money had and received.

Swann in reply.

If the indorſer is liable, it muſt be under the act of aſſembly. But the act of aſſembly gives an action only againſt the maker, as is evident from the proviſion for allowing all juſt diſcounts, not only againſt the holder but againſt his aſſignor before notice. No caſe can be found of an action for money had and received brought by an indorſee againſt a remote indorſer, either before the ſtatute of Anne or after. The caſes cited are of a note payable to *bearer*.

If any action will lay, it muſt be on the ſtatute of Virginia.

Marſhall, chief juſtice.

It is decided in Virginia that an action is maintainable by the aſſignee againſt the aſſignor, and not under the act of aſſembly.

MANDEVILLE & AL. v. RIDDLE & AL.

February 26th. *The chief justice* delivered the opinion of the court.

" The only question in this case is, Whether an action " of *indebitatus assumpsit* can be maintained by the assignee " of a promissory note made in Virginia, against a re- " mote assignor.

" The act of the Virginia assembly which makes notes " assignable, gives the assignee an action of debt in his own " name against the maker of the note, but is silent with " respect to the claim of the assignee against the assignor. " It was therefore long a doubt whether the assignor be- " came liable on his mere assignment, without any special " agreement, for the contents of the note, in the event " of the insolvency of the maker. This doubt has at " length been settled in Virginia, so far as to declare the " liability of the assignor on such assignment; but not the " amount for which he is liable. It seems to be yet a ques- " tion whether he is answerable for the sum mentioned in " the note, or for only so much as he received for it, " provided he shall be able to prove the sum actually re- " ceived. It is also a question whether the assignee can " have recourse to any other than his immediate assignor.

" As the act of assembly gives no right to sue the as- " signor, such an action can only be maintained on the " promise which the law implies from the assignment, and " consequently can only be sustained by and against the " persons to and from whom the law implies such a pro- " mise to have been made. As the assignment is made to " a particular person, the law implies a promise to that " person; but it raises no promise to any other. There " is no fact on which to imply such promise.

" In the language of the books, there is a privity be- " tween the assignor and his immediate assignee; but no " privity is perceived between the assignor and his remote " assignee. The implied promise growing out of the in- " dorsement, is not considered as having been made as- " signable by the act of assembly, and therefore the as- " signee of that promise can not maintain an action of " *indebitatus assumpsit* on it.

" It is therefore the opinion of the court that this ac-
" tion is not maintainable and that the judgment ought
" to be reverſed."*

MANDE-
VILLE & AL.
v.
RIDDLE
& AL.

STUART *v.* LAIRD.

STUART
v.
LAIRD.

ERROR from the *5th circuit in the Virginia diſtrict.*

A cauſe may, by act of congreſs, be transferred from one inferior tribunal to another.

A contemporary expoſition of the conſtitution, practiſed and acquieſced under for a period of years, fixes the conſtruction; and the court will not ſhake or control it.

An action of covenant was brought in January 1801, in " *the court of the United States for the middle circuit in the* " *Virginia diſtrict*," by John Laird, a citizen of the ſtate of Maryland, for and on behalf of Laird and Robertſon of port Glaſgow and ſubjects of the king of Great Britain, againſt Hugh Stuart, a citizen and inhabitant of the ſtate of Virginia.

At the rules in February, 1801, there was an office judgment againſt the defendant for damages, &c. " which " damages," ſays the record, " are to be enquired of and " aſſeſſed by a jury to be ſummoned by the marſhal, and " impannelled before the next court of the United States " for the *middle circuit in the Virginia diſtrict*, which com- " mences on the 22d day of May next enſuing, and ſo the " cauſe aforeſaid ſtood continued, *by virtue of the ſtatute* " *in ſuch caſe made and provided*, until the *court of the Uni-* " *ted States for the fourth circuit in the Virginia diſtrict*, con- " tinued by adjournment and holden at the capitol in the " city of Richmond aforeſaid, on *Thurſday the 17th day* " *of December* 1801; at which day, *to wit*, at a court of " the United States for the *fourth* circuit in the *eaſtern* " diſtrict of Virginia, continued by adjournment, and " holden at the capitol in the city aforeſaid, before the " honorable the judges of the ſaid court, came as well

* *See note (A.) in the appendix to this volume of reports.*

STUART v. LAIRD.

"the plaintiff," &c. and the office judgment being set aside and issue joined upon the plea of covenants performed, there was verdict and judgment for the plaintiffs; upon which, a *fieri facias* issued reciting, in the usual form, the judgment recovered "*in the court of the United States for* "*the fourth circuit in the eastern Virginia district*," and returnable "before the judges of the *said court* at Rich- "mond, in the eastern Virginia district, on the 26th day "of April next." "Witness *Philip Barton Key, esq.* chief "judge of the said court."

The return on this execution was as follows, viz.

"Executed on Maria and child, Paul, Jenny, Selah, "Kate, and Anna, and a bond taken with Charles L. "Carter security, for the delivery thereof at the Eagle "tavern, in the city of Richmond, on the 20th day of "April, 1802, the condition of which was not compli- "ed with.

Ben. Mosley, D. M. for
Jos. Scott, M. E. V. D."

The record then goes on to state, "that heretofore, "to wit, *at a court of the United States for the fifth circuit*, "continued by adjournment, and held at the capitol, in "the city of Richmond, *in the district of Virginia, before* "*the honorable the chief justice of the United States*, on "Thursday, the 2d of December, 1802, came John "Laird, on behalf of Laird and Robertson, by Daniel "Call, gent. his attorney, and moved the said court for "judgment and award of execution against Hugh Stuart "and Charles L. Carter, upon a bond entered into by "them for the forthcoming and delivery of certain pro- "perty therein mentioned to the marshal of the eastern "Virginia district, on the day and at the place of sale, "which was taken by virtue of a writ of *fieri facias* is- "sued from the court of the United States for the *fourth* "circuit in the eastern Virginia district, against the estate "of the defendant Hugh Stuart, which bond is in the "words and figures following, to wit," &c. the condition of which refers to the fieri facias sued out of the court of the United States for the *fourth circuit in the eastern Virginia district.*

The defendants appeared and "ſhowed as cauſes why "the ſaid execution ſhould not be awarded,

"1ſt. That the motion is authorized by no law of the United States and by no part of the common law, and hath been hitherto in ſimilar inſtances, or ſuch as are nearly ſimilar, uſed and admitted, and awards of execution, ſuch as that now prayed for, made in the courts of the United States upon the conſtruction of an act of congreſs approved on the 24th day of September, 1789, by virtue of which awards of execution in ſuch caſes have heretofore been made in the ſaid courts, agreeably to an act of the general aſſembly of Virginia, paſſed on the 10th day of December, 1793: and the ſaid defendants do aver that the ſaid act of congreſs doth not make the laws of the ſeveral ſtates rules of deciſion in the courts of the United States in any caſe whatever, except in trials at common law; and that no deciſion which can be given on the ſaid motion will be a deciſion in a trial at common law.

"2dly. That the ſaid act of the general aſſembly of Virginia is in derogation of the common law, and deprives the citizen of trial by jury, and that the terms in all ſuch acts preſcribed ſhould be regularly and ſtrictly obſerved by all ſuch as would intitle themſelves to the benefit thereof, which hath not been done by the plaintiff in the preſent motion; firſt, becauſe agreeably to the ſaid act, on forfeiture of ſuch bond, the officer, who hath taken the ſame, ſhall return the ſame to the office of the court from whence the execution iſſued, the levying whereof gave him authority to receive the ſame; and that ſuch court may, upon motion of the perſon to whom it is payable, after the obligor hath failed in the performance of the condition thereof, award an execution thereon; but neither the ſaid act of aſſembly or congreſs, nor any other act of aſſembly or congreſs, or part of the common law, doth give ſuch power to any other court; and the ſaid defendant avers that it appears on the face of the notice grounding the plaintiff's motion, that the execution whereon the ſame was taken, was iſſued from the office of the court of the United States for the *fourth* circuit in the eaſtern Virginia diſtrict, where the judgment grounding the ſame is there ſaid to have been obtained: And 2dly, becauſe

STUART v. LAIRD.

that court doth not now exiſt, and this honorable court is a different court from that court. 3dly. That the act of congreſs paſſed on the 29th day of April, 1802, entitled "An act to amend the judicial ſyſtem of the United "States," in ſo far as it annihilated the court of the United States for the fourth circuit in the eaſtern Virginia diſtrict, wherein the ſaid judgment was rendered, is unconſtitutional and void, and doth not authorize this court to award an execution on the ſaid bond on motion.

"All which matters and things the ſaid defendant doth aver as *cauſes* why this honorable court ought not to award execution on the ſaid bond on the preſent motion, and is ready to prove the ſame as this honorable court ſhall direct; Wherefore they pray judgment *whether the court here will take further cognizance of the ſaid motion.*"

To this plea there was a general demurrer and joinder; and the court below being of opinion that the plea was inſufficient, gave judgment for the plaintiff.

To reverſe that judgment the defendant Stuart ſued out the preſent writ of error; and the errors aſſigned were in ſubſtance ſimilar to thoſe alleged in bar of the motion.

C. Lee, for plaintiff in error.

The act of aſſembly of Virginia which gives this ſummary remedy upon forth coming bonds, allows the motion for judgment to be made only to the *ſame* court from which the execution iſſued.

In this caſe the execution iſſued from *the court of the United States for the fourth circuit in the eaſtern Virginia diſtrict compoſed of judges Key, Taylor, and M'Gill.*

The motion was made to the court of the United States for the *fifth circuit in the Virginia diſtrict, holden by the chief juſtice of the United States.*

This is not the ſame court from which the execution iſſued. The motion therefore in this court was not regular, unleſs it be made ſo by the acts of congreſs of *March 8th*, 1802. *ch.* 8. and *29th. Ap.* 1802, *c.* 31. The proceſs in this caſe was ſummary, and the pleadings, although in

this inſtance they happen to be reduced to writing, are in fact *ore tenus*. A poſition will be taken the direct reverſe of that contained in the ſecond point of the plea mentioned in the tranſcript of the record.

The court of the *fifth* circuit ought not to have taken cognizance of the motion; becauſe the court of the fourth circuit *did* exiſt, and not becauſe it did *not* exiſt, as alleged in the plea.

If the acts of 8th March and 29th April, 1802, are conſtitutional, then it is admitted there is no error in the judgment; becauſe, in that caſe, the courts ceaſed to exiſt, the judges were conſtitutionally removed, and the transfer from the one court to the other was legal. But if thoſe acts are unconſtitutional, then the court of the fourth circuit ſtill exiſts, the judges were not removed, and the transfer of juriſdiction did not take place. The legiſlature did not intend to transfer cauſes from one *exiſting* court to another. If then the courts ſtill exiſt, the cauſes, not being intended to be removed from exiſting courts, were not removed.

But we contend that thoſe acts were unconſtitutional ſo far as they apply to this cauſe.

1ſt. The firſt act (March 8, 1802) is unconſtitutional in as much as it goes to deprive the courts of *all* their power and juriſdiction, and to diſplace judges who have been guilty of no miſbehaviour in their offices.

By the conſtitution the judges both of the ſupreme and the inferior courts are to hold their offices during good behaviour. So much has been recently ſaid, and written and publiſhed upon this ſubject, that it is irkſome to repeat arguments which are now familiar to every one.

There is no difference between the tenure of office of a judge of the ſupreme court and that of a judge of an inferior court. The reaſon of that tenure, to wit, the independence of the judge, is the ſame in both caſes; indeed the reaſon applies more ſtrongly to the caſe of the inferior judges, becauſe to them are excluſively aſſigned caſes of life and death.

STUART v. LAIRD.

It is admitted that congreſs have the power to modify, increaſe or diminiſh the power of the courts and the judges. But that is a power totally different from the power to deſtroy the courts and to deprive th m of all power and juriſdiction. The one is permitted by the conſtitution, the other is reſtrained by the regard which the conſtitution pays to the independence of the judges. They may modify the courts, but they cannot deſtroy them, if thereby they deprive a judge of his office. This proviſion of the conſtitution was intended to place the judges not only beyond the reach of executive power, of which the people are always jealous, but alſo to ſhield them from the attack of that party ſpirit which always predominates in popular aſſemblies. That this was the principle intended to be guarded by the conſtitution is evident from the cotemporaneous expoſition of that inſtrument, publiſhed under the title of *The Federaliſt*, and written, as we all know, by men high in the eſteem of their country. *Federaliſt, vol.* 2. *No.* 78.*

Mr. Lee alſo cited and read the ſpeeches of Mr. Madiſon in the convention of Virginia, *(Debates, vol.* 1. *p.* 112.*)* of Mr. Nicholas, *(vol.* 1. *p.* 32. *and vol.* 2. *p.* 152.*)* and of Mr. Marſhall, *(in p.* 125.*)*

The words *during good behaviour* can not mean *during the will of congreſs*. The people have a right to the ſervices of thoſe judges who have been conſtitutionally appointed, and who have been unconſtitutionally removed from office. It is the right of the people that their judges ſhould be independent; that they ſhould not ſtand in dread of any man who, as Mr. Henry ſaid in the Virginia convention, has the congreſs at his heels.

* To ſhow that ſuch writings are to be regarded in forming the true conſtruction of the conſtitution, he read from a newſpaper what was ſaid to be an anſwer from the preſident of the United States to an addreſs from ſundry inhabitants of Providence, in which the preſident is ſuppoſed to have ſaid, "The conſtitution on which our union reſts, ſhall be "adminiſtered by me according to the ſafe and honeſt meaning contem- "plated by the plain underſtanding of the people of the United States, "at the time of its adoption; a meaning to be found in the explanations "of thoſe who *advocated*, not of thoſe who oppoſed it; and who oppoſed "it merely leſt the conſtructions ſhould be applied which they denounced "as poſſible. Theſe explanations are preſerved in the publications of the "time, and are too recent in the memories of moſt men to admit of "queſtion."

It is admitted that the powers of courts and judges may be altered and modified, but can not be totally withdrawn. By the repealing law the powers of both are entirely taken away.

But the laws are alſo unconſtitutional, becauſe they impoſe new duties upon the judges of the ſupreme court, and thereby infringe their independence; and becauſe they are a legiſlative inſtead of an executive appointment of judges to certain courts. By the conſtitution all civil officers of the United States, including judges, are to be nominated and appointed by the preſident, by and with the advice and conſent of the ſenate, and are to be commiſſioned by the preſident. The act of 29th April, 1802, appoints the "*preſent chief juſtice of the ſupreme court,*" a judge of the court thereby eſtabliſhed. He might as well have been appointed a judge of the circuit court of the diſtrict of Columbia, or of the Miſſiſſippi territory. Beſides, *as judge of the ſupreme court*, he could not exerciſe the duties or juriſdiction aſſigned to the court of the fifth circuit, becauſe, by the conſtitution of the United States, the ſupreme court has *only appellate* juriſdiction; except in the two caſes where a ſtate or a foreign miniſter ſhall be a party. The juriſdiction of the ſupreme court, therefore, being *appellate only*, no judge of that court, *as ſuch*, is authorized to hold a court of *original* juriſdiction. No act of congreſs can extend the original juriſdiction of the ſupreme court beyond the bounds limited by the conſtitution.

A party in this court has a right to have his cauſe tried by ſix judges. He has a right to an unbiaſſed court, whether the whole ſix ſit or not. A judge, having tried the cauſe in the court below, and given judgment, muſt be in ſome meaſure committed; he feels an anxiety that his judgment ſhould be affirmed. The caſe of *Clarke and Nightengale*, 3 *Dal.* will illuſtrate this principle. The ſuit was firſt tried before chief juſtice Ellſworth, whoſe opinion upon the merits was in favour of the plaintiff. A writ of error was brought and the judgment reverſed for error in pleading, and the cauſe remanded to be again tried. Judge Cuſhing held the court on the ſecond trial, and his opinion alſo was in favour of the plaintiff upon the merits. A ſecond writ of error was brought and tried in the ſu-

STUART v. LAIRD.

preme court before chief juſtice Ellsworth, judges Cuſhing, Patterſon, Waſhington, and Chaſe, and the judgment was reverſed by the three laſt mentioned judges who made a majority of the court.

A degree of reſpect is certainly due to precedents and paſt practice. If it be ſaid that the practice from the year 1789 to 1801 is againſt us; we anſwer that the practice was wrong, that it crept in unawares, without conſideration and without oppoſition; congreſs at laſt ſaw the error and in 1801 they corrected it, and placed the judicial ſyſtem on that ground upon which it ought always to have ſtood. By the act of February 13, 1801, the precedent was broken, ſo that now precedents are both ways. If there are twelve years practice againſt us, there is one year for us. There has never been a judicial deciſion upon the ſubject. The time has now come when the true conſtruction ought to be ſettled.

If the conſtruction is as we contend, then the court below had no juriſdiction. The power of congreſs to transfer cauſes from one court to another is admitted; but if the acts of March and April, 1802, are totally unconſtitutional, they are void; the cauſes have not been transferred, and the court of the fourth circuit ſtill exiſts, with all its powers and juriſdiction.

Gantt, contra.

This ſuit was originally inſtituted in the circuit court which exiſted under the law of 1789, and was transferred by the act of February 13th, 1801, to the new circuit court by that act eſtabliſhed. It was afterwards, by the act of 1802, re-transferred to the circuit court under the act of 1789, ſo that if the tranfer by the act of 1801 was conſtitutional, the re-transfer by the act of 1802 muſt be equally conſtitutional.

No error is relied on but the want of juriſdiction.

It is admitted that congreſs have power to transfer the juriſdiction of cauſes from one inferior court to another; and therefore the queſtion whether they have the power to deprive a judge of his office, does not belong to this

caſe. It has nothing at all to do with it. But admitting for the ſake of argument that congreſs have not the latter power, yet an act may be conſtitutional in part, and unconſtitutional in part.

Congreſs have an expreſs power by the conſtitution to conſtitute, and, from time to time, to ordain and eſtabliſh tribunals inferior to the ſupreme court The tenure of office may be a reſtraint in part, to the exerciſe of this power, but can not take away altogether the right to alter and modify exiſting courts.

There are not more inſtances of independent deciſions by the judges in England, ſince they have become independent of the crown, than before; for before that time, we find that judges have been ſent to the tower for the independence of their opinions.

The proviſion of the conſtitution reſpecting tenure by good behaviour was not intended to protect the judge; but for the benefit of the people, that judges might, by the permanence of their offices, be always men of experience and learning. It is admitted by Mr. Lee, that if any power remained in the circuit court of the fourth circuit, the act was conſtitutional. But even if the whole powers were taken away, yet new powers and new duties might have been given. It does not follow that becauſe the court is aboliſhed, the office of the judge is taken away. And if the act of 1802 is unconſtitutional, becauſe it aboliſhes the circuit courts then exiſting, the act of 1801 is equally ſo by aboliſhing the old circuit courts.

But, as was before obſerved, there is no neceſſity or wiſh to go into this argument; it is not pertinent to the preſent cauſe; for the only queſtion here is whether congreſs had power to transfer the cauſe from the fourth to the fifth circuit court, and not whether the fourth circuit court or its judges are ſtill in exiſtence.

As to the objection that the law of 1789 is unconſtitutional, in as much as it gives circuit powers, or original juriſdiction, to judges of the ſupreme court; it is moſt probable that the members of the firſt congreſs, many of them having been members of the convention which

STUART v. LAIRD.

formed the conſtitution, beſt knew its meaning and true conſtruction. But if they were miſtaken, yet the acquieſcence of the judges and of the people under that conſtruction, has given it a ſanction which ought not now to be queſtioned.

Lee, in reply.

The acts of 1802 and 1801 were not alike in aboliſhing the circuit courts. The former, in aboliſhing the then exiſting courts, did not turn the judges out of office, or in any degree affect their independence; but the act of 1802 ſtrikes off ſixteen judges at a ſtroke, drives them from their offices, and aſſigns their duties to others.

An error was committed in 1789. That act was unconſtitutional, but the act of 1801 reſtored the ſyſtem to its conſtitutional limits. We now contend for the pure conſtruction of the conſtitution, and hope it will be eſtabliſhed, notwithſtanding the precedent to the contrary.

March 2d. *The chief juſtice*, having tried the cauſe in the court below, declined giving an opinion.

Paterſon, juſtice, (judge Cuſhing being abſent on account of ill health,) delivered the opinion of the court.

On an action inſtituted by John Laird againſt Hugh Stuart, a judgment was entered in a court for the fourth circuit in the eaſtern diſtrict of Virginia, in December term 1801. On this judgment, an execution was iſſued, returnable to April term 1802, in the ſame court. In the term of December 1802, John Laird obtained judgment at a court for the fifth circuit in the Virginia diſtrict, againſt Hugh Stuart and Charles L. Carter, upon their bond for the forthcoming and delivery of certain property therein mentioned, which had been levied upon by virtue of the above execution againſt the ſaid Hugh Stuart.

Two reaſons have been aſſigned by counſel for reverſing the judgment on the forthcoming bond. 1. That as the bond was given for the delivery of property levied on by virtue of an execution iſſuing out of, and returnable to a court for the fourth circuit, no other court could legally

proceed upon the said bond. This is true, if there be no statutable provision to direct and authorize such proceeding. Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.

The present is a case of this kind. It is nothing more than the removal of the suit brought by Stuart against Laird from the court of the fourth circuit to the court of the fifth circuit, which is authorized to proceed upon and carry it into full effect. This is apparent from the ninth section of the act entitled, "an act to amend the judicial "system of the United States," passed the 29th of April, 1802. The forthcoming bond is an appendage to the cause, or rather a component part of the proceedings.

2d. Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistable answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Judgment affirmed.

THOMAS HAMILTON
v.
JAMES RUSSELL.

ERROR from the circuit court of the district of Columbia sitting at Alexandria.

HAMILTON v. RUSSELL.

An absolute bill of sale of goods, is fraudulent as to creditors, *unless possession accompanies and follows* the *deed*. The want of possession is not merely *evidence* of fraud, but is a circumstance *per se*, which makes the transaction fraudulent *in point of law*. The court are not bound to give an opinion on an abstract point of law, unless it be so stated as to shew its connexion with the cause.

James Russel, the defendant, having obtained a judgment against *Robert* Hamilton, brother of the defendant, ordered the marshall to levy the *fieri facias* upon sundry goods and chattels in the possession of Robert, the debtor; which was done accordingly; whereupon the present plaintiff, *Thomas* Hamilton, brought an action of trespass against Russel, claiming the goods by virtue of an absolute bill of sale from his brother Robert, dated the 4th of January 1800, and acknowledged and recorded in the circuit court of the district of Columbia for the county of Alexandria, on the 14th of April 1801. Notwithstanding which bill of sale, Robert, the vendor, continued in possession, and exercised acts of ownership over the property. There was a general verdict in the court below, and judgment for the defendant, upon the general issue.

The transcript of the record contained two bills of exceptions.

The first stated that the defendant "prayed the court "to instruct the jury, that if they should be of opinion "from the evidence that the plaintiff, who claims the "slave George, in the declaration mentioned, under an "absolute bill of sale, for a valuable consideration," (which bill of sale, recorded before the issuing of the *fieri facias* upon which the property was seized, is set forth in the bill of exceptions,) "permitted the vendor, Robert Ham-"ilton, to continue in possession of the slave and to exer-"cise acts of ownership over the same, he the said plain-"tiff has not a good title to the said slave against the exe-"cution of the defendant, who was a *bona fide* creditor of "Robert Hamilton;" which execution the defendant directed to be served "on the said slave. And the court "so instructed the jury," to which the plaintiff excepted.

The second bill of exceptions stated that the plaintiff prayed the court to instruct the jury, "that *a* plaintiff in "trespass, whose property is loaned to a friend, and is in "that friend's possession at the time it is seized by a "sheriff in virtue of an execution against the person so "in possession, can sustain an action of trespass for a "seizure upon such possession;" but the court being divided in opinion did *not* give the instruction as prayed.

Swann, for plaintiff in error, contended that,

1ſt. The bill of ſale being acknowledged and recorded according to the act of aſſembly of Virginia reſpecting frauds and perjuries, (*reviſed code, p.* 18,) is valid, and not fraudulent as to creditors.

That act of aſſembly contains proviſions ſimilar to thoſe in the Engliſh ſtatutes of 29 *Car.* 2, *c.* 3, § 4. 13 *Eliz. c.* 5, § 2, and 27 *Eliz. c.* 4, § 2, and has moreover a clauſe in the following words, viz.

"If a conveyance be of goods and chattels, and be "*not* on conſideration deemed *valuable* in law, it ſhall be "taken to be fraudulent within this act, *unleſs* the ſame "be by will duly proved and recorded, *or* by deed in "writing acknowledged and proved (if the ſame deed in- "clude lands alſo,) in ſuch manner as conveyances of "land are by law directed to be acknowledged or proved, "*or* if it be of goods and chattels only, then acknow- "ledged, or proved by two witneſſes in the general court, "or court of the county, wherein one of the parties lives, "within *eight* months after the execution thereof, *or* un- "leſs poſſeſſion ſhall really and *bonâ fide* remain with the "*donee*."

"This act ſhall not extend to any eſtate or intereſt in "any lands, goods or chattels, or any rents, common or "profit, out of the ſame, which ſhall be upon *good* con- "ſideration, and *bonâ fide*, lawfully conveyed or aſſured "to any perſon or perſons, bodies politic or corporate." Under this act, he contended the deed would be good againſt creditors, notwithſtanding that the poſſeſſion did not accompany the deed. And although the deed was not acknowledged within eight months after its execution, yet being acknowledged and recorded before the *fieri facias* iſſued upon which the goods were ſeized, it was good againſt that execution; and for this he cited the caſe of *Eppes v. Randolph*, 2 *Call's reports*.

2d. The court ought to have inſtructed the jury, as prayed in the ſecond bill of exceptions.

The law is well eſtabliſhed that he who has the *general* property of goods may maintain treſpaſs againſt him who

HAMILTON v. RUSSELL.

tortiouſly takes them out of the poſſeſſion of the owner's bailee. 5 *Bac. ab. Gwillim's Ed.* 164.

Simms, for defendant in error.

As to the firſt bill of exceptions. This deed is clearly fraudulent as to creditors. In the caſe of *Lavender v. Blackſtone*, 2 *Levinz* 147, lord Hale ſaid that "*every* conveyance ſhall be eſteemed *prima facie* fraudulent againſt a purchaſer." And in *Edwards and Harben*, 2 *Term rep.* 594, it is ſaid by Buller, juſtice, to have been the *unanimous* opinion of *all* the judges in England, "that unleſs poſſeſſion *accompanies and follows* the deed, it is fraudulent and void." If the poſſeſſion be inconſiſtent with the deed, it is clear and concluſive evidence of fraud, *Haſelinton v. Gill, cited in Jarman v. Woolloton*, 3 *Term rep.* 620. *Cadogan v. Kennet*, *Cowp.* 434.

The act of aſſembly of Virginia has ſimilar proviſions with the ſtatutes of 13th and 27th Eliz. and nearly in the ſame words. Thoſe proviſions however, were nothing more than a declaration of the principles of the common law.

But this act of aſſembly, by making deeds abſolutely void which are *not* for a valuable conſideration, unleſs acknowledged, cannot be conſtrued to make good, as againſt creditors, a deed purporting to be for a valuable conſideration. The act makes the deeds therein mentioned, which are *not* for valuable conſideration, abſolutely void even between the parties themſelves; and it cannot be pretended that the acknowledgment according to that act would ſet up ſuch a deed againſt *bona fide* creditors. The act was intended to ſuppreſs, and not promote or conceal fraud. If ſuch a conſtruction could be put upon the act as is contended for, it would make valid deeds which would before have been void as being fraudulent againſt creditors. But the act takes no notice at all of ſuch a deed as this, except in the ſecond ſection of the law, where deeds made with the intent to defraud creditors are expreſsly declared to be void. So anxious is the act to ſuppreſs fraud that in the caſe of a loan, if the lender does not demand the property lent in five years, and follow up that demand with a proſecution at law to recover poſ-

 ſion of his goods, the poſſeſſion becomes concluſive evidence of property.

HAMILTON v. RUSSELL.

2d. As to the ſecond bill of exceptions, the court did right in not giving the inſtruction as prayed.

Poſſeſſion is neceſſary to ſupport an action of treſpaſs. *Bul. N. P.* 79. This ought to have been an action on the caſe and not treſpaſs. 1 *Strange*, 635, *Reynolds v. Clarke.* 4 *Term rep.* 489, *Ward v. Macauley.*

C. Lee, on the ſame ſide.

The caſe of *Ward and Macauley* has over-ruled all the caſes cited from Bacon's abridgment, and has been recogniſed in the caſe of *Gordon v. Harper*, 7 *Term rep.* 9, where the doctrine has been carried even farther, and held that neither treſpaſs nor trover would lie unleſs the poſſeſſion, or right of poſſeſſion, was in the plaintiff. In that caſe the goods of the landlord had been leaſed to the tenant, and during the leaſe were taken in execution for the debt of a third perſon. The court held that during the leaſe the landlord had neither the poſſeſſion nor the right of poſſeſſion, and therefore he could maintain neither treſpaſs nor trover. Now in the caſe made by the ſecond bill of exceptions, it is not ſtated whether the loan was for a time certain, or at the will of the lender.

If the loan was for a time certain, there is no difference between that caſe and a leaſe for a time certain. In neither caſe is the poſſeſſion, or the right of poſſeſſion in the plaintiff. The bailee by loan for a time certain, has an equal right to the poſſeſſion, during that time, with a bailee for hire; and either may maintain treſpaſs againſt him who violates that poſſeſſion, whether it be a ſtranger or the owner.

Chaſe, juſtice.

There is here no exception applicable to this caſe. The bill of exceptions ſtates only an abſtract queſtion. It is not whether the plaintiff *in this caſe* can maintain an action of treſpaſs, but whether *any* plaintiff can maintain treſpaſs for property loaned to a friend.

HAMILTON v. RUSSELL.

Swann, in reply,

Relied on the act of assembly of Virginia. The English cases do not apply; for in England they have no such statute authorizing the recording of deeds of personal property; nor any substitute for the actual delivery of possession of goods in any case whatever.

Even a mortgage of personal property is there deemed fraudulent as to creditors unless possession accompanies the deed; and the reason given, in all the books, is, that it gives a false credit to the mortgager, enables him to impose upon the world, and gives him a power to deceive and defraud those who deal with him. 1 *Wilson* 260, *Ryall v. Rolle*. But when such a deed is publicly made and exposed to view upon the public records, as this was, such reason must fail; and with the reason, the law must fail also.

As to the second bill of exceptions,

There is certainly a difference between a loan and a lease. In a loan the lender does not part with the right of possession, nor, in law, does he part with the actual possession; for the bailee's possession, is the possession of the lender, who has a right to resume the thing into his own hands at any moment. There is no adverse possession, nor adverse claim, as there is in the case of a lease.

Fraud or no fraud, is a point to be decided by the jury and not by the court. It is a question of fact; and the court have instructed the jury as if it were a matter of law. The possession of the vendor is not in itself a fraud, but only a circumstance from which, connected with others, the jury may presume the fact of a fraudulent intent.

February 28th. *The Chief Justice* delivered the opinion of the court.

On the 4th January, 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale for a slave in the bill mentioned, which on the 14th of April, 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession

of the vendor; and ſome ſhort time after the bill of ſale was recorded, an execution on a judgment obtained againſt the vendor was levied on the ſlave, and on ſome other perſonal property alſo in poſſeſſion of the vendor. In July, 1801, Thomas Hamilton, the *vendee*, brought treſpaſs againſt the defendant Ruſſell, by whoſe execution, and by whoſe direction, the property had been ſeized; and at the trial, the counſel for the defendant moved the court to inſtruct the jury, that if the ſlave, George, remained in the poſſeſſion of the vendor, by the conſent and permiſſion of the vendee; and if by ſuch conſent and permiſſion the vendor continued to exerciſe acts of ownerſhip over him, the vendee under ſuch circumſtances could not protect ſuch ſlave from the execution of the defendant.

The court gave the inſtruction required, to which a bill of exceptions was taken.

The counſel for the plaintiff then moved the court to inſtruct the jury that a plaintiff in treſpaſs, whoſe property is loaned to a friend, and is in that friend's poſſeſſion at the time it is ſeized by a ſheriff in virtue of an execution againſt the perſon ſo in poſſeſſion, can ſuſtain an action of treſpaſs for a ſeizure upon ſuch poſſeſſion.

The court, being divided, refuſed to give the inſtruction required, and the jury found a verdict for the defendant. Judgment was accordingly rendered for the defendant, to which a writ of error has been ſued out, and the queſtion is, whether the court below has erred in the inſtructions given or refuſed.

In the opinion to which the firſt bill of exceptions was taken, it is contended on two grounds that the circuit court has erred.

1ſt. Becauſe this ſale is, under the act of the Virginia aſſembly againſt fraudulent ſales, protected by being recorded.

2dly. That if it be not protected by that act, ſtill it is only evidence of fraud, and not in itſelf a fraud.

HAMILTON v. RUSSELL.

On examining the act of assembly alluded to, the court is of opinion that it does not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be a valid one, if recorded within eight months. On this point one judge doubted, but he is of opinion that this bill of sale was not recorded within the time required by the act, and that the decision in the case of *Eppes v. Randolph*, which was made by the court of appeals of Virginia, on a different act of assembly, would not apply to this act.

On the second point there was more difficulty. The act of assembly, which governs the case, appears, as far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th of Eliz. and those acts are considered as only declaratory of the principles of the common law. The decisions of the English judges therefore apply to this case.

In some cases a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence, or a badge, of fraud, to be submitted to the jury, under the direction of the court, and not as constituting in itself, in point of law, an actual fraud which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined, that an unconditional sale, where the possession does not "accompany and follow the deed," is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition which does not entitle the vendor to the immediate possession. The case of *Edwards v. Harbin, exr. of Tempest Mercer*, 2 *Term rep.* 587, turns on this distinction, and is a very strong case.

William Tempest Mercer, on the 27th of March, 1786, offered to the defendant Harbin, a bill of sale of sundry chattels as a security for a debt due by Mercer to Harbin. This Harbin refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should

remain unpaid, to take poſſeſſion of the goods and ſell them, in ſatisfaction of the debt. The ſurplus money to be returned to Mercer. To this Mercer agreed, and a bill of ſale, purporting on the face of it to be abſolute, was executed, and a corkſcrew delivered in the name of the whole. Mercer died within the fourteen days, and immediately after their expiration Harbin took poſſeſſion of the goods ſpecified in the bill of ſale and ſold them. A ſuit was then brought againſt him by Edwards, who was alſo a creditor of Mercer, charging Harbin as executor in his own wrong, and the queſtion was, whether this bill of ſale was fraudulent and void, as being on its face abſolute, and being unaccompanied by the delivery of poſſeſſion. It was determined to be fraudulent; and in that caſe it is ſaid that all the judges of England had been conſulted on a motion for a new trial in the caſe of *Bamford v. Baron*, and were unanimouſly of opinion that "unleſs poſſeſſion accompanies and follows the deed, it is fraudulent and void;" that is, that unleſs the poſſeſſion remain with the perſon, ſhown by the deed to be entitled to it, ſuch deed is void as to creditors within the ſtatutes. This principle is ſaid by judge Buller, to have been long ſettled and never to have been ſeriouſly queſtioned. He ſtates it to have been eſtabliſhed by lord Coke, in 2*d Bulſtrode*, ſo far as to declare that an abſolute conveyance or gift of a leaſe for years, unattended with poſſeſſion, was fraudulent. "But if the deed or conveyance be conditional, there the vendor's continuing in poſſeſſion does "not avoid it, becauſe by the terms of the conveyance "the vendee is not to have the poſſeſſion till he has performed the condition." "And that caſe, continues "judge Buller, makes the diſtinction between deeds or "bills of ſale which are to take place immediately, and "thoſe which are to take place at ſome future time. For "in the latter caſe, the poſſeſſion continuing with the "vendor till ſuch future time, or till that condition be "performed, is conſiſtent with the deed, and ſuch poſſeſſion comes within the rule as *accompanying and following* the deed. That caſe has been univerſally followed by all the caſes ſince." "This," continues the judge, "has been argued by the defendant's counſel as "being a caſe in which the want of poſſeſſion is only evidence of fraud, and that it was not ſuch a circumſtance "*per ſe*, as makes the tranſaction fraudulent in point of

HAMILTON v. RUSSELL.

"law; that is the point which we have considered, and "we are all of opinion, that if there is nothing but the "absolute conveyance, without the possession, that in point "of law is fraudulent."

This court is of the same opinion. We think that the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession "*accompanies and follows the deed.*" This construction too comports with the words of the act. Such a deed must be considered as made with an intent "*to delay, hinder, or defraud creditors.*"

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question not belonging to the cause.

Judgment affirmed with costs.

UNITED STATES

v.

R. T. HOOE AND OTHERS.

U. STATES v. R. T. HOOE & AL.

Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript. This provision was revived by the repeal of the act of February 1801.

THIS was a writ of error to a decree of the circuit court of the district of Columbia, sitting as a court of Chancery.

The case was, that colonel Fitzgerald in the year 1794 was appointed collector of the customs for the port of Alexandria, and gave bond to the United States in the penalty of 10,000 dollars, with R. T. Hooe as his surety, for the faithful performance of the duties of the office. In consequence of misapplication of large sums of money by the chief clerk, who was entrusted with almost the whole

management of the buſineſs, col. Fitzgerald became deficient in his accounts with the United States to the amount of 57,000 dollars. After this fact was diſcovered he executed a deed of truſt of part of his real eſtate to truſtees, to be ſold to indemnify Hooe from the demands of the United States againſt him, as ſecurity of Fitzgerald, and alſo to ſecure him againſt ſundry notes which he had indorſed for him at the bank of Alexandria, as well as to enable him to take up further ſums at the bank, as his exigencies might require. After the death of col. Fitzgerald, the truſtees advertiſed the property for ſale, and the United States obtained an injunction to ſtay the ſale, alleging that by the acts of congreſs, they were entitled to a prior lien upon the eſtate of their debtor; and that the deed, as to them, was fraudulent. In the court below, the claim of the United States was reſted altogether upon the prior lien created by the act of congreſs; and the court being of opinion that the act did not create a lien on the real eſtate, and that there did not appear to be any fraud in the tranſaction, diſſolved the injunction, with coſts, and ordered 10,000 dollars, part of the proceeds of the ſale, to be paid into the treaſury of the United States in ſatisfaction of the bond, in which Hooe was the ſurety, and the reſidue, after paying the notes due at bank, to be paid into the treaſury of the United States, in part ſatisfaction of the balance due from the eſtate of Fitzgerald. It having been proved to the ſatisfaction of the court, that the money, ariſing from the notes diſcounted at the bank, had been before paid by Fitzgerald to the United States.

To reverſe this decree, the preſent writ of error was ſued out by the attorney for the United States.

The decree of the court below did not ſtate the *facts* upon which the decree was founded; and although the record contained the bill, anſwers, exhibits and all the evidence which was before the court below, yet no ſtatement of facts, according to the proviſion of the judiciary act of 1789, ch. 20. §. 19, was made by the parties or by the court.

The attorney general * opened the cauſe on the part of

* Mr. Lincoln.

U. STATES v. R. T. HOOE & AL.

the United States, and was going on to ſhew that the deed was fraudulent, as to creditors, upon general principles of law, (a ground not taken in the court below) when he was ſtopped by an enquiry from the court, whether there was any proviſion in the act concerning the diſtrict of Columbia, by which the caſe was taken out of the operation of the nineteenth ſection of the judiciary act of 1789, which required a ſtatement of the facts to accompany the record. Upon recurring to the act of congreſs, 27th February 1801, concerning the diſtrict of Columbia, ch. 86. §. 8, it was found that writs of error were to "be proſecuted in the ſame manner, under the ſame regu- "lations, and the ſame proceedings ſhall be had therein, "as is, *or ſhall be* provided in the caſe of writs of error on "judgments, or appeals upon orders or decrees rendered "in the circuit court of the United States." Upon which the court ſaid, that the deciſions on the act of 1789, §. 19, had been, that unleſs a ſtatement of facts appeared upon the record, they could not ſay there was error. 3. *Dallas*, 337, *Jennings v. Brig Perſeverance.* It is true that the act of *February* 13. 1801. *chap.* 75. §. 33, remedied the evil, but that act was repealed in 1802, ſo that the law now ſtands as it did before the act of 1801. And the act concerning the diſtrict of Columbia, by ſaying that writs of error ſhall be proſecuted in the ſame manner as is, *or ſhall be*, provided, &c. places this caſe under the law of 1789. Whatever might be the preſent opinion of the court if this were the firſt time of being called upon to give a conſtruction to that clauſe of the act, yet the queſtion has been ſolemnly ſettled. One legiſlature has taken cognizance of the conſtruction given by the court, and has provided for the caſe, but another legiſlature has repealed that proviſion and thereby given a ſubſequent legiſlative conſtruction, or at leaſt ſhewn ſuch a legiſlative acquieſcence under the conſtruction which this court formerly gave to the act, as is now concluſive.

At the requeſt of the attorney general, the writ of error was diſmiſſed. †

† Congreſs being in ſeſſion at this time, an act was introduced and paſſed, containing a clauſe ſimilar to the 33d ſection of the act of 13th February, 1801, reſpecting writs of error and appeals in caſes of equity and maritime juriſdiction, &c. *Laws of U. S. vol. 6. p.* 315, *c.* 93, 3*d March*, 1803.

HEPBURN AND DUNDAS
v.
COLIN AULD.

THIS was an action of debt brought by Hepburn and Dundas againſt Colin Auld in the circuit court of the diſtrict of Columbia, for the penalty of an agreement dated 27th September 1799, between the plaintiffs, merchants of Alexandria, and the defendant, as agent for John Dunlop and co. merchants in Glaſgow.

The agreement recites that whereas the plaintiffs have had extenſive dealings with Dunlop and co. in the courſe of which the former appear to have fallen in debt to the latter, by the accounts by them exhibited, ſome articles of which accounts having been objected to by the plaintiffs, they had agreed with the ſaid agent to ſubmit all matters in diſpute to arbitration. And whereas the plaintiffs, by an article of agreement between them and a certain William Graham, dated 12th March 1796, did covenant with him, (for the conſideration of 18000 dollars to be by him paid to them at certain times in the ſaid article expreſſed) to convey to him the ſaid Graham his heirs and aſſigns 6000 acres of land on the Ohio; but the ſaid Graham failing to make the firſt payment upon the day ſtipulated, the plaintiffs conſidered the ſaid contract as thereby annulled, and in conſequence thereof brought an ejectment to recover poſſeſſion of the land, which they had permitted Graham to occupy, which ejectment had been abated by his death, and another ejectment had been or was about to be commenced.

The indenture then witneſſeth, that each party covenanted to furniſh their accounts to the arbitrators ſo as to enable them to make their award by the 1ſt day of January then next, being the time ſtipulated by the arbitration bonds. That *Auld* covenanted that he, or the agent of Dunlop and co. would, on the 2d day of January then next, *accept and take*, of the plaintiffs, the amount

HEPBURN & DUNDAS v. AULD.

which ſhould be awarded to Dunlop and co. *in bills of exchange*, of a certain deſcription, *or in any money* which might by law be a legal tender; and *on ſuch payment* being made in either way, give the plaintiffs *a full receipt and diſcharge of all claims and demands of Dunlop and co. againſt them.* That the *plaintiffs* covenanted, that in caſe they did not, on the 2d of January then next, pay to the defendant, or the then agent of Dunlop and co. the amount of the award, in *bills or money*, they would, on that day, aſſign and transfer to the defendant, or the then agent of Dunlop and co, *in the fulleſt manner*, the aforeſaid contract entered into by them with Graham for the ſale of the land, and all and every intereſt, right and claim, of whatever kind, of the plaintiffs, ariſing out of and from the ſaid contract; with full power to proceed and act thereupon and therein as the defendant or the then agent of Dunlop and co. ſhould think proper; and that they would for that purpoſe give him a full and ample power of attorney irrevocable to purſue in their names, if neceſſary, all legal ways and means, either to recover the poſſeſſion of the land, or to enforce payment of the 18000 dollars and intereſt, whichever of the meaſures he might be inclined to purſue; and that in caſe they ſhould ſo aſſign the ſaid contract, they would not thereafter in any manner interfere with the meaſures he might chuſe to purſue, either for the recovery of the lands, or to enforce the payment of the purchaſe money. And that whenever the ejectment ſhould be judicially determined, or ſettled by compromiſe, they would convey the lands to the perſon who by ſuch determination or compromiſe ſhould be acknowledged to be entitled to them. And that in caſe the ſaid purchaſe money, which, with intereſt to the ſaid 2d day of January, would amount to 21,112 dollars, ſhould not prove ſufficient to ſatisfy the award, they would on that day pay the balance to the defendant or the then agent of Dunlop and co.

And the defendant covenanted that in caſe it ſhould not be convenient for the plaintiffs to pay the amount of the award in bills, or money, on the 2d day of January, he would accept and take an aſſignment of the ſaid Graham's contract, at 21,112 dollars, *towards* the diſcharge of the ſaid award; *and that in caſe it ſhould exceed the amount of the* award, he would, at the time of making the ſaid

assignment, pay them the excess. For the faithful performance of these articles, the parties bound themselves to each other in the penal sum of 45,000 dollars. The sum of 21,112 dollars exceeded the amount of the award, by the sum of £494. 6. 7. Virginia currency. For the non-payment of this excess the present action was brought by the plaintiffs, after having tendered an assignment of Graham's contract and a power of attorney, which was refused by the defendant. There were four issues *in fact*, but to the 5th plea there was a general demurrer and joinder. Judgment below being in favor of the defendant upon this demurrer, the issues in fact were not tried, and the plaintiffs sued out the present writ of error.

The fifth plea was as follows, "and the said defendant "by virtue of the act, &c. and by leave of the court, for "further plea, protesting that the said deed of assignment "of the contract aforesaid, with the said William Graham, "so as aforesaid, pretended to have been executed, sealed "and tendered by the plaintiffs on the 2d day of January "in the year 1800, was not a good, lawful and sufficient "assignment thereof, according to the true intent and "meaning of the said articles of agreement between the "plaintiffs and defendant, he, the defendant, saith, that "the said deed of assignment was not tendered to him un-"conditionally, but upon the condition, that the said John "Dunlop and company should *first* sign, seal and deliver, "by the said Colin Auld their attorney, on the same day, "unto the plaintiffs, a release and acquittance of all the "claims and demands of the said John Dunlop and com-"pany, against the said plaintiffs; and the said defendant, "then and there, refused to comply with the said con-"dition, and the said plaintiffs, then and there, refused "to deliver the aforesaid deed of assignment to the said "defendant, unless he complied with the condition afore-"said; and this, he is ready to verify; wherefore he prays "judgment, whether the plaintiffs, their action afore-"said against him, ought to have and maintain, &c."

Swann, for plaintiffs in error.

It will be perceived by the agreement, that the plaintiffs had the choice of three modes of paying the award.

HEPBURN & DUNDAS v. AULD.

1. By bills of exchange, 2. By caſh, and 3. By an aſſignment of Graham's contract.

It is true, that the words are, that the defendant will take the aſſignment "*towards*" the diſcharge of the award. But the reaſon of uſing the word "*towards*" is plainly, becauſe the amount of the award not being then known, it remained an uncertainty, whether the 21,112 dollars of Graham's purchaſe money would be ſufficient in amount to meet and ſatisfy the award. The word *towards* therefore was not uſed to exclude the idea that the aſſignment ſhould be a complete diſcharge of the award, in caſe the award did not exceed the purchaſe money; but only to prevent Auld from being compelled to accept the aſſignment in *full* diſcharge of the award, if the purchaſe money ſhould fall ſhort of the ſum awarded.

1ſt. We contend that the aſſignment was a good and ſufficient aſſignment within the meaning and intention of the agreement.

2d. That the plaintiffs had a right to a releaſe of all demands upon tender of the aſſignment.

3d. That the plaintiffs had a right to make ſuch releaſe a condition of their tender.

1ſt. It is no objection to the aſſignment that it expreſſes the conſideration to be a releaſe of all demands from Dunlop and co. for if the plaintiffs had a right to ſuch a releaſe, it was proper to ſtate it as part of the conſideration. 2d. The preamble of the aſſignment ſtates the defendant to be agent of Dunlop and co. and the *habendum* is to the *ſaid* Colin Auld, which refers to the premiſes where he is ſtyled agent; ſo that it is, in fact, as it ought to be, to Colin Auld *agent of Dunlop and co.*

2d. As to the right of the plaintiffs to inſiſt upon a releaſe of all demands.

1ſt. It is due by the terms of the contract.

2d. If not due by the terms of the contract, yet it was due of common right.

1ſt. It is due by the contract.

Every contract ought to have a reaſonable conſtruction according to the intention of the parties. Such a releaſe is expreſsly agreed to be given in caſe of payment by bills or caſh. A payment by the aſſignment was as complete a diſcharge of the award, as payment in either of the other modes. The diſcharge of the amount of the award, and not the particular mode of diſcharge, was to be the conſideration of the releaſe; and having ſtipulated to give it in the one caſe, it ought to be preſumed to be the intention of the parties, that it ſhould be given in the other, unleſs there can be ſhewn ſome difference in the conſideration, or ſome reaſon operating upon the mind of the defendant which might have induced the omiſſion of an expreſs agreement to that effect. By agreeing to give it in caſe of payment by caſh or bills, he allows that the plaintiffs have a right to ſuch a releaſe upon diſcharge of the award. The ſubmiſſion was of all demands; a diſcharge of the award then was a diſcharge of all demands; and therefore,

2dly. Such a releaſe was due of common right. A man has a right to demand evidence of his payment, and of the claims which are thereby ſatisfied. It is true he may call witneſſes, but they may die. If a man pay money upon a ſpecialty, he has a right to written evidence of the payment. *Shep. Touch.* 348.

3d. The plaintiffs had a right to make the releaſe a condition of the tender. All things were to be done on the ſame day. They were concurrent conditions, to be performed at the ſame time. If one party is ready and willing and offers to perform, and the other will not, the firſt is diſcharged from the performance of his part and may maintain an action againſt the other. 4. *Term Rep.* 761. *Goodiſſon v. Nunn.* *Doug.* 684. *Jones v. Barkley.*

Such a releaſe could not operate to the injury of the defendant, or of Dunlop and co. It would not have releaſed any right accruing under the agreement; as was decided in the caſe of *Thorpe v. Thorpe, lord Raymond* 235. The covenants of the plaintiffs reſpecting the lands and the ejectment are all future and contingent, and therefore

HEPBURN & DUNDAS v. AULD.

could not have been releaſed by a releaſe of all *demands*. Nor was the penalty a preſent duty. It could only be incurred by a future breach, and therefore is not like a bond to pay a ſmaller ſum at a future day. *Shep. Touch.* 339, 340. *Buller.* 160. 2. *Show.* 90. *Carthage v. Manby. Eſp. N. P.* 307. *Cro. Jac.* 170. *Hancock v. Field. Cro. Jac.* 623. *Porter v. Philips. Cro. Eliz.* 580. *Hoe v. Marſhall.* 5 *Co.* 70. *(b.) Hoe's caſe.*

E. J. Lee, contra.

The aſſignment, in this caſe tendered, was not good, becauſe it ſtated part of the conſideration to be a releaſe of all demands, which the defendant was not bound to give; and if he had accepted of the aſſignment in that form, it would have been an acknowledgment that he was bound to give it.

Whether Auld might with ſafety have given ſuch a releaſe, is not now the queſtion; he has not contracted to give it, and it is not for us to enquire why he did not. He was unſkilled in the law, and he might have ſuppoſed that in ſome way or other, it would embarraſs the claims of Dunlop and co. againſt the plaintiffs for a future performance of their covenants reſpecting the land.

2d. The aſſignment is made to the uſe of Colin Auld, and not to the uſe of Dunlop and co. The rents and profits are to be received to his uſe, and not to that of his conſtituents. In the operative parts of the aſſignment he is not named as agent.

3d. The power of attorney is inſufficient, becauſe it does not give *full* power to act therein, as the defendant ſhould think proper, and does not authorize him to compromiſe the ejectment.

But the principal queſtion is, whether the defendant was bound to give a releaſe of all demands.

The plaintiffs only tendered the papers, but did not deliver them, ſo that the defendant could not ſee whether they were correct. *They* were to do the firſt act. They were firſt to make and *deliver* the aſſignment before they

were entitled to the balance. The words of the agreement plainly ſhow this.

The agreement does not require him to give ſuch a receipt in the caſe of payment by the aſſignment of Graham's contract. It would certainly have been as eaſy to have covenanted to give ſuch a releaſe in that caſe, as in the event of payment by bills or caſh. The not doing ſo, in the former caſe, and the expreſs agreement for it in the latter caſes, creates the ſtrongeſt preſumption that it was not intended by the parties to be given in the former caſe; and the intention of the parties conſtitutes the agreement.

Admitting that by common right, they were entitled to a receipt, it could only be a receipt for the aſſignment itſelf.

There was at leaſt a doubt whether ſuch a releaſe as was demanded would not have diſcharged the penalty annexed to the contract, or at leaſt the covenants reſpecting the land.

A releaſe of all demands is certainly a releaſe of all preſent duties, and it is ſaid in *Altham's caſe*, 8. *Co.* 154. *(a.)* that a releaſe of all demands is a releaſe of all *cauſes* of demand.

As the plaintiffs have demurred to our plea, we have a right to look into their declaration; to which, there are two objections.

1ſt. That it contains no *profert* of the *award* which is the foundation of their action; and

2d. That it does not aver the difference between the amount of the award, and the purchaſe money due upon the contract tendered. The declaration only ſtates, that the arbitrators awarded the ſum of £.4379. 9. 0. ½. ſterling, to be due from the plaintiffs to Dunlop and co. and that the plaintiffs having elected to aſſign Graham's contract in diſcharge of the award, tendered an aſſignment thereof, together with a power of attorney, according to the true intent and meaning of the agreement, *in conſequence whereof* the plaintiffs then and there became entitled

HEPBURN & DUNDAS v. AULD.

to have and receive of the ſaid defendant, the ſum of £.494. 6. 7. *Virginia currency*, which ſaid ſum, the defendant, although required, had not paid, whereby action accrued to the plaintiffs to have 45,000 dollars, the penalty of the articles of agreement.

C. Lee, on the ſame ſide.

The *proteſtando* in the plea ſaves all objections to the ſufficiency of the aſſignment; and we conceive the objections, which have been ſtated, are ſubſtantial.

But the principal queſtion is, whether any releaſe at all could be demanded. The contract does not, in any of the caſes of payment of the award, require a *releaſe*; which is a technical word, and means an inſtrument under ſeal. But we do not inſiſt upon this diſtinction, as the law is full in our favor upon the other points. We might ſafely admit, that the defendant was bound to give a *receipt for the aſſignment*; but even that is not due under the contract, nor of common right. However, ſuch a receipt was not demanded, and therefore it is unneceſſary to enquire, whether the defendant was, or was not bound to give it.

The releaſe required would have diſcharged the penalty of this agreement. *Viner. Tit. Releaſe (P.) pl.* 18.

It is not contended, that a releaſe contained in an inſtrument will releaſe demands growing out of that inſtrument; this was the caſe of *Thorpe and Thorpe*. *Hoe's* caſe does not apply to the preſent; that was a caſe of mere *poſſibility* of a demand. The covenant of the plaintiffs, not to interfere with the ejectment, was a preſent duty.

This is a caſe of conſtruction only, and the only queſtion is, what was the intention of the parties. If the deed of aſſignment was not a proper one, or the releaſe demanded was ſuch an one as the defendant was not bound to give, the plea is good, and the judgment muſt be affirmed.

Maſon in reply.

All the inſtruments are to be taken together, 2, *Atk. Crop v. Norton*. Through the whole it appears that what

the plaintiffs are bound to do, the defendant was bound to receive. The payment by the aſſignment was not more for the benefit of the plaintiffs than of the defendant. If they did not on the 2d of January pay in bills, or caſh, they were abſolutely bound to aſſign Graham's contract; and the defendant might then refuſe the bills, or caſh, and inſiſt on the aſſignment; and a court of chancery would have compelled a ſpecific aſſignment, if they had refuſed. The diſcharge of the award by the aſſignment was the ſame thing as the diſcharge by bills of exchange or caſh. It would have been a complete diſcharge of the award, and there is no reaſon why he ſhould not give a releaſe as well in the one caſe as the other.

It is alleged that the releaſe would have diſcharged the other covenants, and the penalty of the agreement. But the caſe cited from *Viner* ſhews that the covenants would not have been diſcharged by the releaſe, nor would it have diſcharged the penalty. The covenant *not to interfere* was not a preſent duty. The covenant of the plaintiffs is, that *after* the aſſignment, they would not interfere. But a releaſe of all demands does not diſcharge a covenant before it is broken; until that time it is no demand. The ſame obſervation applies to the penalty; it is not a preſent duty until a breach of the covenant. A bond in the penalty of £200, to pay £100 at a future day, is a preſent duty. But in a bill penal, the penalty is not a duty till after the day appointed for the payment of the ſmaller ſum. The difference in declaring upon the two inſtruments ſhews their different nature. On a bond you only declare that he bound himſelf in the penalty; and you take no notice of the condition. But on a bill penal you declare that the defendant having failed to pay the ſmaller ſum, an action has accrued to recover the penalty. To ſupport theſe poſitions he cited *Eſp. N. P.* 307. *Buller* 166. *Cro. Jac.* 170. *Hancock v. Field*, *Cro. Jac.* 300. *Tyman v. Bridges*. *Cro. Jac.* 623. *Porter v. Philips*, 1 *lord Raym.* 662. *Thorpe. v. Thorpe*, and *Cro. Eliz.* 579, *Hoe v. Marſhall.*

The plaintiffs having offered to perform their part of the agreement, are intitled to their action. *Eſp. N. P.*

HEPBURN & DUNDAS v. AULD.

284. *Doug.* 684. *Jones v. Barkley.* 4. *Term rep.* 761. *Goodiſon v. Nunn.*

As to the *proteſtando*, it is only an eſtoppel, or, as lord Coke ſays, it is an *excluſion* of a *concluſion*. It does not put in iſſue the validity of the aſſignment. But if it did, the objections are not well grounded. Whether the releaſe ought to have been mentioned as part of the conſideration depends upon the queſtion whether the defendant was bound to give ſuch a releaſe; and the objection, that the aſſignment is made to *Colin Auld*, and not to Colin Auld as agent of Dunlop and co. is not grounded in fact: For in the preamble of the aſſignment he is named as *agent for Dunlop and co.* and throughout the reſidue of the inſtrument he is called the *ſaid* Colin Auld, which refers back to the premiſes to ſhow in what capacity he was to take the aſſignment.

In the premiſes a complete intereſt is conveyed to Auld as attorney in fact of Dunlop and co. and the *habendum* can not, in this caſe, control the premiſes. 2. *Bl. Com.* 298.

February 28th. *The Chief Juſtice*, after ſtating the caſe, delivered the opinion of the court.

To entitle themſelves to the money for which this ſuit was inſtituted, it is incumbent on the plaintiffs to ſhew that they have performed the very act, on the performance of which the money became payable; or that they are excuſed by the conduct of the defendant for its non-performance. The act itſelf has not been performed: but a tender and refuſal is equal to a performance; and it is contended that there has been ſuch a tender and refuſal in this caſe.

The pleadings ſhow that the tender was not unconditional; but the plaintiffs inſiſt that the condition, annexed to the tender, was ſuch as they had a right to annex to it, and on their correctneſs in this opinion, depends the judgment now to be rendered.

The plea does not conteſt the ſufficiency of the deed of aſſignment and power of attorney which were tender-

ed; and consequently no question concerning their sufficiency can arise in the present case.

The only cause relied on, as doing away the operation of the tender, is that it was made on condition that a release of all the claims and demands of the said John Dunlop and co. on the said Hepburn and Dundas, should *first* be signed, sealed and delivered to them by Colin Auld.

The only question in the case is, whether Hepburn and Dundas had a right to insist on this previous condition; and it is admitted that this question depends entirely on the agreement of the 27th of September 1799.

That an acquittance should be signed, sealed and delivered before the act itself was performed, which entitled the party to such acquittance, is a mode of proceeding very unusual, and which certainly could only be rendered indispensible by express stipulation.

There is in this case no such express stipulation. If the payment had been made in bills or money, the release of all the claims and demands of John Dunlop and co. against them was to have been given, not previous thereto, but *upon receiving such payment*. If then, as has been argued, the deed of assignment and power of attorney are substituted for the payment in money or in bills, and to be made on the same conditions on which payment, in either of those articles, was to have been made, yet there could exist no right to demand a delivery of the receipt *before* the payment.

If we inspect those covenants which relate to the deed of assignment of Graham's contract, we find no stipulation respecting a release of any sort The agreement is that he will receive the said deed of assignment at 21,112 dollars, towards the discharge of the award, but he does not engage to give any release whatever.

It is contended that upon the general principles of justice and of law, Hepburn and Dundas had a right to the evidence of the payment they had made without expressly contracting for such evidence; and this is true, so far

HEPBURN & DUNDAS v. AULD.

as to entitle them to a receipt for the deed and power delivered; but neither the general principles of justice, nor of law, give Hepburn and Dundas a right to insist upon any release as a previous condition.

The case has been argued at bar, as if the condition of the tender of the deed of assignment and power of attorney had been a release of all claims and demands, to be given at one and the same time with the delivery of such deed and power, but this is not the case as presented in the pleadings. According to the plea, Hepburn and Dundas required the delivery of the release as a condition precedent to their livery of the deed of assignment.

This demand seems not to have been countenanced by the contract; and of consequence the tender was not such as it was incumbent on Hepburn and Dundas to have made, in order to entitle themselves to the money for which they have brought this suit.

Judgment affirmed with costs.

MARINE INSURANCE COMPANY OF ALEXANDRIA, v. JAMES YOUNG.

INSURANCE CO. OF ALEX. v. YOUNG.

Assumpsit will not lie upon a policy of insurance under the corporate seal, unless a new consideration be averred.

Quere, whether an aggregate corporation can make an *express* assumpsit,

THIS was an action brought in the circuit court of the district of Columbia, by James Young, against the *Marine Insurance Company of Alexandria*, upon a policy of insurance on the brigantine Liberty at and from Anacabessa in Jamaica to a port in the United States. The declaration stated, that "James Young complained of the "Marine Insurance Company of Alexandria *in custody*, &c. "of a plea, for that whereas," &c. setting forth the policy in the usual form. "In witness whereof the president "and directors of the said Marine Insurance Company of

INSURANCE CO OF ALEX. v. YOUNG.

" Alexandria, by William Hartſhorne their Preſident, " ſubſcribed the ſum aſſured, and cauſed the *common ſeal*, " and the atteſtation of their ſecretary, to be affixed to " the ſaid preſents." It then alleged the property of the veſſel to be in the plaintiff, and that it was of the value of 5000 dollars, the ſum inſured. That the ſaid Marine Inſurance Company, in conſideration of the premium, to be paid by the plaintiff, " *did undertake and agree*, by their " policy aforeſaid, ſubſcribed by their preſident aforeſaid, " with the proper hand and name of the ſaid preſident " thereto affixed, to aſſure the ſaid veſſel, &c. at the ſaid " ſum of 5000 dollars, againſt the riſks ſpecified in the " ſaid policy." That the plaintiff had paid the premium; and that the veſſel was totally loſt, of which loſs the company had notice; " *By means of which ſaid premiſes the* " *ſaid Marine Inſurance Company of Alexandria became lia-* " *ble to pay to the ſaid plaintiff* the ſaid ſum of 5000 dol- " lars, and being ſo liable the ſaid Marine Inſurance Com- " pany, afterwards, to wit, on the ſame day and year " aforeſaid, at the county aforeſaid, *aſſumed upon themſelves*, " and to the ſaid plaintiff then and there *faithfully promi-* " *ſed*," to pay him the ſaid ſum of money when thereunto afterwards required.

unleſs ſpecially authorized by ſtatute? Whether an action on a policy will lie againſt this company, in their corporate name? Or whether the declaration muſt not be againſt the Preſident alone? A verdict will not cure a miſtake in the nature of the action. A judgment in *aſſumpſit* upon a policy is a bar to a ſubſequent action of *covenant* on the ſame policy. After verdict, every aſſumpſit in the declaration is to be taken as an *expreſs* aſſumpſit.

There was another count, ſtating generally, that in conſideration that the plaintiff would pay the premium of four per cent. upon the value of the veſſel, the inſurance company " *undertook and agreed*" to inſure, &c. at the ſum of 5000 dollars, againſt ſea riſks only, at and from Anacabeſſa in Jamacia, &c. to a port in the United States; that he had paid the premium, and that the veſſel was ſtranded and loſt, of which the Inſurance Company had notice; by means of *which ſaid premiſes* the ſaid company *became liable*, &c. and ſo being liable *aſſumed upon themſelves* and *promiſed to pay*, &c. Nevertheleſs the ſaid defendants, not regarding their ſeveral *promiſes and undertakings* aforeſaid, but contriving, &c. refuſed to pay, to the damage of the plaintiff 10,000 dollars. Plea *non aſſumpſerunt* and iſſue. Verdict for plaintiff on the *firſt* count, and for defendant on the other count.

Motion in an arreſt of judgment; " becauſe the firſt " count is in *aſſumpſit* upon a *ſealed inſtrument* ſet forth " in the ſaid count, as containing the contract whereupon

INSURANCE CO. OF ALEX. v. YOUNG.

"the action aforesaid is brought." Judgment for the plaintiff; to reverse which judgment the Insurance Company obtained the present writ of error; and the errors assigned were,

1. "That assumpsit is brought upon a sealed contract."

2. "That the Marine Insurance Company of Alexandria, being an aggregate corporation, is sued upon assumpsit, instead of upon covenant."

3. "That the judgment upon the verdict aforesaid ought to have been arrested."

4. "That according to the act of incorporation, the action aforesaid, if maintainable at all, should have been commenced and prosecuted, against William Hartshorne, president of the Marine Insurance Company."

E. J. Lee and C. Lee, for plaintiffs in error.

Simms and Swann, for defendant.

For the plaintiffs in error, it was said,

1st. that the declaration states the policy to be under the common seal, and the law is clear that assumpsit will not lie upon a sealed instrument. The action ought to have been *covenant*, and not *case*. The difference is, that when the specialty is only inducement to the promise, and a new consideration intervenes, *assumpsit* will lie; but where the only contract, which is stated as the cause of liability of the defendant, is fully and entirely contained in the specialty, and no circumstance is added but such as is provided for by the specialty, there it will not maintain a *general indebitatus assumpsit*, which is the present form of action.

The declaration states that the Insurance Company by their policy, under the common seal, insured 5000 dollars on the brig, and that the vessel was lost, whereby the company became liable, and, being so liable, assumed to pay.

This is the whole ſubſtance of the declaration. No new conſideration is alleged. The whole ground of liability of the plaintiffs in error is their policy under their common ſeal. And in ſuch a caſe the action muſt be *covenant* or *debt*. *Marſhall on inſurance*, 596. *Park*, 396. "The act of parliament 6. *G.* 1. *c.* 18. by which the "two Inſurance companies" (of England) "were erected, "ordered that they ſhould have a common ſeal, by affix-"ing which all corporate bodies ratify and confirm their "contracts. Hence a policy made by either of thoſe com-"panies is a contract *under ſeal*; and if the contract is "broken, the action muſt be debt or covenant."* 2. *Term rep.* 479. *Foſter v. Allanſon*, and the caſes there cited. In that caſe there was a new cauſe of action and a ſeparate independent conſideration.

Cro. Car. 343, *Brett v. Read.* 1 *Bac. ab* 164. In the caſe of *Baird and Brigs v. Blaigrove*, in the court of appeals of Virginia, 1. *Waſh. rep.* 170, there was a ſubſequent new conſideration and parol agreement expreſsly proved, and upon that ground the court decided that aſſumpſit would lie. See 2. *Calls. rep.* 258. *Taliaferro v. Robb.* The caſe of *Pelly v. Governor and company of the royal exchange aſſurance*, 1. *Bur.* 341. is an action of *covenant* upon a policy; ſo is the caſe of *Warſley v. Wood*, 6. *Term rep.* 710. and *Tarleton v. Staniforth*, 5. *Term rep.* 695. *aſſumpſit* will not lie upon a ſpecialty. 1. *Eſp. N. P.* 95. *Doug.* 6. *Walker v. Witter. Cro. Jac.* 213. *Buckingham v. Coſtendine.* 2. *Strange* 1027, 1028. *Bulſtrode v. Gilburn. Cro. Jac.* 505. *Bennus v. Guyldley. Cro. Jac.* 598. *Dartnal v. Morgan. Cro. Car.* 6. *Holme v. Lucas. Cro. Car.* 31. *Foſter v. Smith. Cro. Eliz.* 242. *Reade v. Johnſon.* 1 *Roll. ab.* 8. *Hutt.* 34. *Green v. Harrington. Cro. Eliz.* 283. *Pyers v. Turner.*

If this action is ſuſtainable in law, then the rule requiring a plaintiff to ſtate in his declaration his cauſe of action will be uſeleſs. The reaſon of that rule is, to aſcertain whether the contract is under ſeal or not, *Buller*, *N. P.* 128. And if the judgment of the court below is

* By the 11. *G.* 1. *c.* 30. §. 43. which recites the inconveniences reſulting from the neceſſity of the policies of theſe two companies being *under ſeal*, by reaſon of their being corporate bodies, they are authorized to plead generally *nil debent*; and to give the ſpecial matter in evidence, &c.

INSURANCE CO. OF ALEX. v. YOUNG.

correct, an action of aſſumpſit may be maintained upon a bond or any other ſealed inſtrument. The notice ſtated in the declaration, is what the plaintiff below was bound to give, becauſe the company were not liable, by their covenant to pay, until proof of the loſs was produced, and adjuſtment thereof made. This is only one of the facts neceſſary to produce a liability under the covenant itſelf, and not any new conſideration, nor is it ſtated as ſuch in the declaration. The declaration does not ſay "*in* "*conſideration whereof*," but ſimply, "*ſo being liable*," aſſumed to pay; ſo that the aſſumpſit alleged, is nothing more than the very agreement contained in the policy.

2d. An action of *aſſumpſit*, upon an expreſs contract, will not lie againſt an aggregate corporation.

They can do no valid act but by their common ſeal, by which alone the union of the wills of the ſeveral members can be teſtified; and the affixing of the ſeal makes it a covenant. Perhaps an exception to this rule might be made by the act which creates ſuch an aggregate body politic; but here is no ſuch exception made as will apply to the preſent caſe. *Marſhall on inſurance* 596.

3d. If any action is maintainable upon this policy, it ought to have been brought and proſecuted againſt the preſident of the company and not againſt the body politic.*

The words of the act, which incorporates the company (*acts of aſſembly of Virginia*, 1797, *c.* 20, §. 9, *and* 11) are, "That all policies ſhall be *ſigned* by the preſident, or "in caſe of his inability to attend, by the preſident *pro* "*tempore*, and counter-ſigned by the ſecretary." §. 11. "That in caſe any action ſhall be proſecuted upon any "policy ſo ſubſcribed, the ſame ſhall be *brought* againſt

* The *capias ad. reſp.* in this caſe was againſt "*William Hartſhorne*, "*preſident of the Marine Inſurance Company of Alexandria*."

The declaration was againſt the company in their corporate name.

This form of proceeding, by the better opinion, ſeemed to be correct.

By the form of proceedings in Virginia, which are in ſome reſpects ſimilar to thoſe in the kings bench in England the capias is not conſidered as any part of the record of the action, which is ſuppoſed to commence upon the filing of the bill, or declaration.

" the *preſident* ſubſcribing the ſame, or his ſucceſſor in of-
" fice; and all recoveries had in ſuch action or actions
" ſhall be concluſive *on the company*, ſo far as to render the
" ſtock of the company liable, and no further."

Although the ſixth ſection of the ſame act enables the company to ſue and be ſued by their corporate name, yet as the ſubſequent ſections preſcribe the manner of making policies, and the mode of proceeding in actions upon them, the latter ſections muſt be conſidered as ſo far reſtricting the general expreſſions of the former. General words in one clauſe of a ſtatute may be reſtrained by particular words in a ſubſequent clauſe of the ſame ſtatute, and the whole ought to be ſo conſtrued, that, if it can be prevented, no clauſe, ſentence, or word ſhall be ſuperfluous, void, or inſignificant. 4. *Bac. ab.* 645.

The declaration is bad in ſtating the body politic to be *in cuſtody of the marſhal.* 1. *Bac. ab.* 507.

4th. If it ſhould be ſaid, that this declaration is good after verdict; the anſwer is, that the verdict will not cure a declaration, which ſhows that the plaintiff is entitled only to an action of a different nature. The title is not defectively ſet forth, becauſe every fact is ſtated which ſhows that the plaintiff is entitled to an action of covenant. A miſtake in the nature of the action is not cured by the ſtatute of jeofails. In all the caſes before cited, the queſtion as to the form of action came on upon motion in arreſt of judgment, and it is not even hinted that the error was cured by verdict. 2. *Term Rep.* 479. *Foſter v. Allanſon.* 1. *Waſhington's Rep.* 170. *Baird v. Blaigrove.*

No aſſumpſit can be preſumed, after verdict, to have been proved on the trial, but that which is alleged in the declaration. 1 *Term Rep.* 141. *Spieres v. Parker.*

A verdict will not aid a caſe where the *giſt* of the action is omitted. *Cowper*, 825. *Avery v. Hoole.* Nor does the clauſe of the Virginia ſtatute of jeofails, which ſtates that a verdict ſhall cure the omiſſion of the averment of any matter without proving which, the jury ought not to have given ſuch a verdict, extend to a caſe where the declaration omits to ſtate the ground of the aſſumpſit. 2. *Waſh.*

INSURANCE CO. OF ALEX. v. YOUNG.

rep. 187. *Winſton v. Franciſco*, 1 *Call's rep.* 98, 101, 102. *Chicheſter v. Vaſs.* 4. *Bur.* 2455. *Doug.* 654. (679.) *Ruſhton v. Aſpinal.* A recovery in this action would be no bar to a recovery in an action of covenant for the ſame loſs. 1 *Call* 102. *Chicheſter v. Vaſs.* 4 *Bac. ab.* 14. *Cro. Car.* 6. *Holme v. Lucas.*

For the defendant in error it was contended,

1ſt. That this policy is not a ſpecialty.

2dly. If it is a ſpecialty, yet there was a ſubſequent *aſſumpſit* upon a new conſideration.

3dly. That if it be a ſpecialty, and no new promiſe ſufficient to ſupport an action of *aſſumpſit*, yet the declaration is a good declaration in *covenant*, eſpecially after verdict.

1ſt. The declaration does not declare on this policy as upon a deed. It does not ſay that the company covenanted by their deed: but only that Young did, by a *policy of inſurance ſubſcribed and atteſted* as herein after mentioned, make inſurance and cauſe himſelf to be inſured, loſt, or not loſt, &c. upon the body, &c. of the brigantine Liberty, &c. And ſo they, the aſſurers, were contented, and did thereby *promiſe* and bind themſelves to the aſſured for the true performance of the premiſes, confeſſing themſelves paid the conſideration, &c. In witneſs whereof the preſident and directors of the ſaid marine inſurance company of Alexandria, by William Hartſhorne their preſident, *ſubſcribed the ſum aſſured*, and cauſed the *common ſeal and the atteſtation of their ſecretary* to be affixed to the ſaid preſents in the town of Alexandria, on the ſaid 17th day of December 1800. The plaintiff then avers, that in conſideration of the premium, &c. they did *undertake and agree* by their policy aforeſaid, *ſubſcribed by their preſident aforeſaid*, with the proper *hand* and *name* of the ſaid preſident thereto affixed, to aſſure the ſaid veſſel, at the ſum of 5000 dollars, &c. There is no profert of the policy, as of a deed. In fact, it is not a deed. To make it a deed, it muſt be ſealed with the *intent* to make a deed, which would be contrary to their act of incorporation. The company had no power to make a policy under ſeal. The act preſcribes the mode by which they ſhall make policies;

which is only by the *ſigning* of the preſident and counter-ſigning by the ſecretary. Although there are not negative words by which other modes are expreſsly prohibited, yet the ſaying that a thing ſhall be done in *one* manner is an implied negative of all others. The preſident and three of the directors are empowered by the act to make inſurance, but the policies muſt be certified in a certain manner. They have no right to bind the company by a policy under ſeal. They have no right to uſe the common ſeal for any purpoſe, unleſs particularly empowered by the conſtitution or bye-laws of the company. If the company have improperly put a ſeal to the inſtrument, which the act of incorporation intended ſhould be a *ſimple* contract, and not a ſpecialty, it is their own act, and they have no right to complain. But ſhall it be permitted for the Marine Inſurance Company to ſay, that by their own act, contrary to law, they have deceived the plaintiff below, and therefore, he ſhall not recover in this *form* of action? After having defeated him in this action, and driven him to bring an action of covenant, what will prevent their turning round and ſaying, that this policy is not a ſpecialty? The company had no power to make a policy under ſeal, or if they had, the ſeal has been affixed by perſons having no authority from the company, or perhaps by miſtake. The objection does not go to the merits of the cauſe. If there was an error, it was beneficial to the company, in as much as it was a relinquiſhment of ſtrict right on the part of the plaintiff below, and enabled the company to make their defence with much leſs riſk, as it enabled them to give in evidence, on the plea of *non aſſumpſit*, thoſe facts which muſt have been ſpecially pleaded to an action of *covenant*. The intention of the legiſlature in preſcribing the mode of making policies, evidently was, that they ſhould not be ſpecialties, but only ſimple contracts, ſo as to avoid the neceſſity of ſpecial pleading. If the principle be correct, that the company cannot make a policy but under ſeal, the conſequence will be extremely miſchievous to their intereſts. They will be always involved in the intricacies of ſpecial pleading, and the merits of the caſe will be often loſt in the ſubtlety of legal diſtinctions.

Who has the power of uſing the common ſeal? Not the preſident alone, nor any number of the directors, but

INSURANCE CO. OF ALEX. v. YOUNG.

the *company* only. But the declaration does not ſtate this to be the ſeal of the company, but the ſeal of the *ſecretary*; the words are, "hav- cauſed the common ſeal and atteſ- "tation *of the ſecretary* to be affixed."

2d. But if the policy is a ſpecialty, yet there is a ſufficient *aſſumpſit* alleged in the declaration to ſupport this action.

The action does not depend only upon the facts ſet forth in the policy. The declaration ſtates other facts, ſuch as the notice to the company, the proof of the loſs, and an expreſs aſſumpſit to pay. Theſe are conſiderations abundantly ſufficient to ſupport the action. If the plaintiff has two remedies he may take which he pleaſes. A judgment in this caſe would be a bar to an action upon the covenant. *

It is a ſtrange poſition that aſſumpſit will not lie in any caſe againſt an aggregate body politic, upon an expreſs contract. Such a corporation cannot act in any caſe but by the intervention of agents. But by thoſe, it may contract debts by ſimple contract, as well as by ſpeciality. The Eaſt India company have their agents all over the world, and there never was a queſtion, whether ſuch agents could make promiſes binding on the company purſuant to powers given by the company, for that purpoſe. By what law are the banks authoriſed to bind themſelves by promiſſory notes? Yet the gentlemen will not ſay that they are not liable upon their notes. 3 *P. Williams*, 419, *Rex v. Bigg.* 1 *Strange*, 18. *S. C.* 2. *Burr.* 1216. *Edie v. E. I. Company.* Where the ſpecialty is only inducement to the action, and upon facts growing out of the ſpecialty an *aſſumpſit* is made, the action of *aſſumpſit* will lie. 2. *Term rep.* 483. *Moravia v. Levy.* The declaration ſtates the policy, the failing of the veſſel, the loſs, notice to the inſurers, and thereupon an *expreſs aſſumpſit* to pay the ſum of 500 dollars. Theſe new facts bring the caſe within the reaſon of the deciſion in the caſe of *Moravia v. Levy.* Af-

* The court ſaid there could be no doubt of that; if the declaration ſufficiently ſhowed it to be the ſame cauſe of action.

ter verdict, every assumpsit alleged in the declaration is to be taken as an *express* assumpsit. *

3d. But if this policy is to be considered as a speciality, and there is no new consideration sufficient to support the *assumpsit*, yet this is a good declaration in *covenant*.

It states the policy, and the facts which constitute a breach of the agreement and create a liability on the defendants below. That part which states an *assumpsit* may be rejected as surplusage, and the residue will make a good declaration in covenant. The want of profert is cured by the verdict. 2 *Wilson* 362. *(Quere)* Nor will the issue of non assumpsit, render the judgment erroneous. It has been held that in an action of assumpsit, and *not guilty* pleaded and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. 4 *Bac. ab.* 84.

It is not necessary that the action should be *prosecuted* against the president of the company. It could not be the intention of the legislature, that the private property of the president should be liable to satisfy a judgment upon a policy made on account of the company, and that he should be left to get his money back again from the company. By the act of incorporation, the joint stock only is liable. The expressions of the act warrant the practice in this case, of bringing the *capias* only against the president, and then declaring against the company; for it only says, that the action shall be *brought* against the president, and not that it shall be *prosecuted* against him to final judgment. The intention of the act could only be to compel an appearance, and to give the president the power of entering an appearance in the name of the company. The act says that all such recoveries shall be conclusive on the company, so far, as to render the joint stock liable, and no further.

The sixth section of the act renders the company liable to actions in their corporate name; and as the writ is no part of the record, and the company have appeared and pleaded, it is now too late for them to allege this for error.

* This was admitted by the Chief Justice.

INSURANCE CO. OF ALEX. v. YOUNG.

They ought not to be permitted to take the chance of a trial, and when the merits have been found againſt them, come forward and ſay, they are not the proper perſons againſt whom the ſuit ought to have been brought.

In reply, it was ſaid, that the policy is in the uſual form; a form which is generally uſed, whether the policy be under ſeal or not: and therefore no argument can be drawn from the peculiar expreſſions of the inſtrument. The declaration ſtates it to be under the *common ſeal*, which is a technical name for the ſeal of a corporation. The act which creates this company has no negative words by which they are forbidden to make policies under ſeal if they think proper. The clauſe which authorizes them to make a policy by the ſignature of the preſident, without the common ſeal, was introduced for their benefit, ſo as to enable them to defend actions without the neceſſity of that ſpecial pleading which often attends actions of covenant. The general maxim of law is that every one may wave a proviſion introduced for his benefit.

The act of incorporation ſays, that when *any* action ſhall be proſecuted upon ſuch policy, the ſame *ſhall* be brought againſt the preſident who ſubſcribed the ſame, or his ſucceſſor in office, and all recoveries in *ſuch* actions ſhall be *concluſive* on the company. Not only the *capias* muſt be againſt the preſident, but the declaration and judgment. How the judgment is to be ſatisfied is not for us now to determine, nor is it important. The mode of recovery preſcribed by the law muſt be purſued.

March 1ſt 1803. *The Court* reverſed the judgment, and ordered it to be arreſted, becauſe the action is a ſpecial action *upon the caſe* on the policy, and the declaration ſhows that the policy is a *ſpecialty*.

The court ſeemed to be of opinion that an action of covenant would lie upon it againſt the company in their corporate name.

ABERCROMBIE *v.* DUPUIS AND ANOTHER.

ABERCROMBIE *v.* DUPUIS & ANOTHER.

ERROR to a judgment of the circuit court for the diſtrict of Georgia. The plaintiffs below (or *petitioners* as they are called in the record) "aver, that they do "ſeverally *reſide* without the limits of the *diſtrict* of Geor- "gia aforeſaid, to wit, in the ſtate of Kentucky, there- "fore they have the right to commence their ſaid action "in this honorable court, &c."* The defendant is called "Charles Abercrombie, *of the diſtrict of Georgia, eſquire.*

To give juriſdiction to the courts of the United States the pleadings muſt expreſsly ſtate the parties to be *citizens* of different ſtates, or that one of them is an alien. It is not ſufficient to ſay that they *reſide* in different ſtates.

It was aſſigned for error that the circuit court had not juriſdiction of the cauſe, becauſe it does not appear upon the record that either of the parties is an alien, nor that the parties are *citizens* of different ſtates. And for this error the judgment was reverſed without argument.

The court ſaid that the queſtion had been decided after full argument in the caſe of *Bingham v. Cabot*, 3 *Dal.* 383, and they did not think proper to over-rule that caſe.

The chief juſtice ſaid, he did not know how his opinion might be, if the queſtion were a new one.

LINDO *v.* GARDNER.

LINDO *v.* GARDNER.

THIS was an action of *debt* brought by the adminiſtrators of Archibald Gardner againſt Abraham Lindo, upon a *promiſſory note*, in the circuit court of the diſtrict of Columbia, ſitting in Waſhington. The act of congreſs reſpecting the diſtrict of Columbia had adopted the laws of Maryland, as the law of this part of the diſtrict. In Maryland the ſtatute of 3 & 4 Anne, c. 9, reſpecting promiſſory notes, had been "introduced, uſed "and practiſed by the courts of law," and thereby, and

Debt will not lie, in Maryland, upon a *promiſſory note*. *Quere*, Whether the ſtatute of limitations can be given in evidence, on *nil debet?*

* This averment follows immediately after the *ad damnum*, at the foot of the declaration.

LINDO v. GARDNER.

by virtue of the declaration of rights, ſection 3d, it became the law of the land; and the courts of Maryland, in their conſtruction of that ſtatute, have always reſpected the adjudications of the Engliſh courts. In the court below there was a verdict and judgment for the plaintiffs; to reverſe which judgment the defendant ſued out the preſent writ of error.

The declaration is "of a plea that he render to them "336 dollars, 97 cents, money of accompt of the United "States of America, for that the defendant on the 5th "of October 1795, at, &c. by his certain note in writ-"ing of that date, ſubſcribed with his proper manuſcrip-"tion, and now here ſhewn to the court, acknowledged "himſelf to owe to Archibald Gardner the ſaid ſum of "336 dollars and 97 cents, which the ſaid defendant "promiſed to pay the ſaid Gardner, and to the order of "the ſaid Gardner, at ſixty days after the date of the ſaid "note in writing, *it being in conſideration of value received.*" It then avers the non-payment, &c. and makes a profert of the letters of adminiſtration which are averred to be "*in due form.*" The defendant in the court below pleaded *nil debet*; and after verdict againſt him, moved in arreſt of judgment, becauſe,

1. An action of debt cannot be maintained upon the promiſſory note ſet forth in the declaration.

2. It does not appear that the plaintiffs had obtained ſuch letters of adminiſtration, as to entitle them to maintain an action upon the ſaid note.

3. The declaration is in the *debet and detinet*, and ought to be in the *detinet* only. *

There was alſo a bill of exceptions ſtating the refuſal of the court to ſuffer the defendant to give the ſtatute of limitations in evidence on the plea of *nil debet*.

The note was in theſe words, "Philadelphia, Octo-"ber 5, 1795. At ſixty days, I promiſe to pay to the or-

* The capias, which, in Maryland, is conſidered as part of the record, was in the *detinet* only. The declaration was in neither the *debet* nor *detinet*, having omitted thoſe words altogether.

" der of Mr. Archibald Gardner, three hundred and thirty " six $\frac{27}{100}$ dollars, value received." *A. Lindo.*

LINDO v. GARDNER.

Peacock, for plaintiff in error, was about to produce authorities on the first point, when he was stopped by Chase, justice, who said, that *an action of debt will not lie in Maryland upon a promissory note.*

No opposition being made on the part of the defendant in error, judgment was afterwards reversed without argument.†

HODGSON v. DEXTER.

THIS was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late secretary at war, for not keeping in good repair, and for not delivering up in like good repair at the end of the term, certain premises which had been leased by the plaintiff to the defendant, for the purpose of offices for the war department; the buildings having been destroyed by fire during the term.

HODGSON v. DEXTER.

A public agent of the government, contracting for the use of government, is not *personally* liable, although the contract be under *his seal.*

Quere. What shall be said to be the act of God; and what *inevitable casualty?*

The lease was in these words.

" This indenture, made the 14th day of August, in the " year of our Lord one thousand eight hundred, between " Joseph Hodgson of the city of Washington and terri- " tory of Columbia, of the one part, and Samuel Dexter " of the same place, *secretary of war*, of the other part, " witnesseth, that the said Joseph Hodgson, for and in " consideration of the sum of four hundred dollars, cur- " rent money of the United States, to him in hand paid " by the *said* Samuel Dexter, at or before the sealing and " delivery of these presents, the receipt whereof is hereby " acknowledged, hath demised, granted, and to farm let, " and by these presents, doth demise, grant, and to farm " let, to the *said* Samuel Dexter *and his successors*, all that " the three story messuage or tenement, erected and built

† *See Note B. in the Appendix.*

HODGSON v. DEXTER.

" on part of lot number 14 in square number 75, situate " on the Pennsylvania avenue in the city of Washington " aforesaid, together with the back ground and improve- " ments; running from the said messuage (fronting 26 " feet) in parallel lines down to lot number 12, on said " square, being the premises next adjoining the messuage " or tenement now in the occupation of Mr. Jonathan " Jackson, with the improvements and appurtenances " thereto belonging, or appertaining, to have and to hold " the said demised premises unto him, the *said* Samuel " Dexter *and his successors*, from the day of the date hereof, " for and during, and unto the full end and term of eight " calendar months from thence next ensuing and fully to " be complete and ended. And the said Joseph Hodgson " for himself, his heirs, executors, administrators and as- " signs, doth hereby covenant, promise and agree to and " with the *said* Samuel Dexter *and his successors*, that he, " the *said* Samuel Dexter *and his successors*, shall and may " peaceably and quietly have, hold, use, occupy, possess " and enjoy the above demised premises for and during " the term granted thereof, without the let, suit, trouble, " molestation or eviction of him, the said Joseph Hodgson, " or his heirs or assigns, or of any other person or persons " whatsoever lawfully claiming or to claim by, from, un- " der, or in trust for him or them. And the *said* Samuel " Dexter for himself *and his successors*, doth hereby cove- " nant, promise and agree to and with the said Joseph " Hodgson, his heirs and assigns, that he the *said* Samuel " Dexter *and his successors*, shall and will at all times during " the said term, keep, or cause to be kept, in good and suf- " ficient repair, the said demised premises, *inevitable casu- " alties and ordinary decay excepted*; and the same, so well " and sufficiently kept in repair, shall and will at the end " of the said term, yield and surrender up to him the said " Joseph Hodgson, his heirs and assigns. In witness " whereof, the *said* parties have hereunto interchangeably " set their hands and seals, the day and year first above " written.

SAMUEL DEXTER, Seal.
JOSEPH HODGSON, Seal.

" Signed, sealed and delivered
" in the presence of
" *John Goulding*,
" *S. Lewis, jun.*"

The declaration contained two counts. The first alleged the breach, thus, "but hath broken the same in this, "to wit, that during the said term of eight calendar "months, he did not keep or cause to be kept the said de- "mised premises in good and sufficient repair, inevitable "casualties and ordinary decay excepted; and that he "hath not, at the end of the said term, yielded and sur- "rendered up to the plaintiff, the same, so well and suf- "ficiently kept in repair." The second count alleged that the defendant hath not observed and kept his covenant aforesaid, in this, to wit, "that he did not keep or "cause to be kept, the said demised premises in good and "sufficient repair, inevitable casualties and ordinary decay "excepted, but that the same, by an *evitable* casualty, to "wit, *by fire*, were destroyed, consumed and burnt, during "the said term of eight calendar months, to wit, on or "about the eighth day of November 1800, and that the "said fire, and *evitable casualty*, was occasioned and took "place from negligence, and from the act or acts of one "or more evil disposed persons." "And after the said fire, "and after the expiration of the said term, the said defen- "dant did not so yield and surrender up the said premises "according to the tenor and effect of his said covenant." —To the plaintiff's damage 10,000 dollars.

The defendant, after oyer, pleaded in bar, 1st. "That "before the expiration of the said term of eight calendar "months in the said writing mentioned, viz. on the 8th "of November 1800, the said demised premises, *against* "*the will, and without the negligence, or other default of him* "*the said Dexter, were burned and consumed by fire happening* "*from some cause to the said Dexter then and yet wholly un-* "*known.* And the said Dexter further saith, that saving "and excepting only the damage occasioned by the same "burning and consuming, he, the said Dexter, hath, at "all times, during the said term of eight calendar months, "kept, and caused to be kept, in good and sufficient re- "pair the said demised premises; and that he hath, at "the end of the said term, yielded and surrendered up to "the plaintiff the said demised premises, so well and suf- "ficiently kept in repair, saving, and excepting only the "damage occasioned by the burning and consuming "aforesaid, and this the said Dexter is ready to veri- "fy," &c.

HODGSON v. DEXTER.

To this plea, there was a general demurrer, and joinder.

To the second, third, and fifth pleas, there were issues in fact. *The fourth plea* was as follows, "that on the 15th "of May 1800, the president of the United States, for the "time then being, in pursuance of authority given to "him by law, did order and direct the various offices be- "longing to the several executive departments of the Uni- "ted States, of which, the department of war then was, "and yet is, one, to be removed to the city of Washing- "ton on the first day of June, then next ensuing; and "that in obedience to the same order and direction, the "various offices of the department of war aforesaid were "removed to the said city of Washington on the said first "day of June, and that thereby it became proper and ne- "cessary, that a suitable building should be hired, in "which, the said offices of the said department of war "might be holden and kept, and for this purpose, and for no "other purpose whatever, the building, mentioned in the "indenture aforesaid, was, by the said indenture, leased "to the said Dexter; and that, at the time of executing "the writing aforesaid, he was secretary of the department "of war, and in that capacity did make and execute the "same, and that before the expiration of the said term of "eight calendar months, viz. on the 1st day of January "1801, he, the said Dexter, at Washington aforesaid, re- "signed the office of secretary of the department of war, "and from and after that time, ceased to hold the same "office, and until this time, he hath never holden the same; "and further, that on the fifth day of March, in the year "last mentioned, Henry Dearborn, esquire, was there du- "ly appointed and commissioned as secretary of the de- "partment of war, and then and there accepted of the "same office, and hath ever since held the same; and he, "the said Dearborn, now is, and ever since his acceptance "of the said office of secretary of war as aforesaid, hath "been the lawful *successor* of him, the said Dexter, in the "said office; and this, the said Dexter is ready to veri- "fy," &c.

To which plea, the plaintiff replied, "protesting that "the said Dexter did not, in his capacity of secretary of "war, sign, seal, execute and deliver the indenture of "lease aforesaid exhibited, yet, by way of replication, he

" faith, that although the said Dexter ceased to be secre-
" tary of war on the 1st day of January 1801, and that on
" the 5th day of March, in the same year, a certain Henry
" Dearborn became his successor, duly appointed secretary
" of the department of war, and still remains such, yet
" that the house and premises, in the lease aforesaid men-
" tioned, were burnt down and consumed by fire arising
" from within the same, from the negligence or default,
" not of the said Dexter, but of some person unknown,
" during the term aforesaid, viz. on the 8th of November
" 1800, while the said Dexter was secretary of war, and
" whilst he had possession of the said premises, and before
" the appointment of the said Dearborn; and that neither
" the said Dexter, nor any other person, hath, during the
" continuance of the said lease, or at any time, built up
" and repaired the said premises; and this, the said Hodg-
" son is ready to verify," &c.

To this replication, there was a general demurrer and joinder.

The 6th plea was, " that on the 15th day of May 1800,
" the president of the United States, for the time then
" being, in pursuance of authority given to him by law,"
ordered the executive offices to be removed to Washington,
&c. as stated in the fourth plea, " and that it became
" proper and necessary that a suitable building should be
" hired in which the several offices of the department of
" war aforesaid might be holden and kept, *and that for*
" *these purposes, and for no other purpose whatever*," the
buildings &c. " were by the said indenture leased to the
" said Dexter *by the said Hodgson*; and that at the time
" when the said Dexter executed the indenture aforesaid,
" *he was secretary of the said department of war*; and this
" he is ready to verify," &c.

To this there was a general demurrer and joinder.

Upon these demurrers the judgment below was against the plaintiff, who thereupon sued out the present writ of error.

Martin, attorney general of Maryland, and Key, for plaintiff in error.

Dexter, and Maſon, attorney of United States for the diſtrict of Columbia, for defendant.

Key made three points.

1ſt. That the defendant is individually and perſonally liable and bound to the performance of the covenant in the indenture contained, by him executed, and on which the ſuit is brought.

2d. That the defendant's firſt plea is bad in law, is argumentative, and does not put in iſſue matters competent to bar the plaintiff's action.

3d. That the defendant's fourth plea is bad in ſubſtance, is no bar, and wants form.

1ſt. The ſixth plea and demurrer are calculated to bring into view the queſtion whether the defendant has bound himſelf perſonally to the performance of the covenant.

Although a public agent is not generally liable for contracts made by him in that capacity; ſtill he is capable of binding *himſelf* as well as his government, by uſing apt words for that purpoſe.

This caſe is not of importance from any *general* principles which it will eſtabliſh. The deciſion muſt depend upon the expreſſions and operation of the indenture of leaſe.

The defendant has uſed ſtrong obligatory expreſſions, of plain unequivocal import. "And the ſaid Samuel "Dexter for *himſelf*, and his ſucceſſors, doth hereby *cove-* "*nant*, *promiſe* and *agree* to and with the ſaid Joſeph "Hodgſon his heirs and aſſigns." To weaken the force of theſe expreſſions it is ſaid that he only intended to bind himſelf in his official character as ſecretary at war, firſt, becauſe he is ſtyled in the premiſes, *ſecretary at war*; 2dly. becauſe the term *ſucceſſors* is uſed throughout the inſtrument; 3dly, becauſe the words "*ſaid* Samuel Dexter," and "*ſaid* parties have hereunto ſet their hands and ſeals," refer to Samuel Dexter in the official character in which he is firſt named in the premiſes.

1ſt. As to the ſtyling him, ſecretary at war, in the premiſes, it is only a deſcription of the perſon, *deſignatio perſonæ*.

It is the office of the premiſes to identify the contracting parties, and it is moſt common to uſe any honourable title which they may enjoy. It is not in the preamble that we are to look for the force of the expreſſions of the covenant, but in the covenant itſelf. It is a rule of conſtruction that when obligatory words, of plain unequivocal meaning, are uſed, you can not reſort to other parts of the inſtrument to contradict them. But when equivocal or doubtful words are uſed, you may. A party uſing expreſſions that legally bind him, is eſtopped to ſay he did not intend to be bound in his individual capacity.

The word "*himſelf*" is to be taken ſeparately from the words "his ſucceſſors," and each is to be applied to the obligatory words of the covenant; *reddenda ſingula ſingulis*. The ſaid Samuel Dexter covenants for himſelf, and for his ſucceſſors He covenants that *he* will ſurrender the premiſes in good repair; and if he does not ſo ſurrender them, he covenants that *they*, *his ſucceſſors*, will. Words can not be ſtronger than thoſe which he has uſed.

2dly. As to the word "ſucceſſors." Mr. Dexter can have *no* ſucceſſors, in the legal ſenſe of the word. It is true that Mr. Dearborn filled the office *poſterior* to Mr. Dexter, and hence, in point of time, ſucceded him, and was in that ſenſe, his ſucceſſor; but he is not his ſucceſſor in any known legal ſenſe of the word. There is no legal connexion between them. Mr. Dexter was not competent to bind his ſucceſſor in any manner. He was not a corporation ſole; and there is no law of the United States which authorizes him to bind his ſucceſſor. The word, "ſucceſſors," has no operation whatever. Mr. Dearborn was not obliged to occupy the houſe, nor would an action have been maintainable againſt him for the rent. If he had been diſturbed in the poſſeſſion, he could have had no action upon the covenant; if he had been ouſted, he could not have ſupported an ejectment. Even if Mr. Dexter had been a corporation ſole, his ſucceſſors would not be bound. No chattel can be limited to the ſucceſſors of a corporation ſole; but it will go to the executor, and not to the ſucceſſor.

HODGSON v. DEXTER.

If these observations are correct, then the word "successors," is surplusage, and the lease enured to Mr. Dexter in his individual capacity; but this point will be resumed.

3dly. As to the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals;" they can have no operation to let in Mr Dexter's official character. Either he bound himself in his official capacity, or as an individual.

Nothing can be inferred from the word "said," but that it related to him in one capacity or the other; and in which, is the very question before the court.

Let us now examine this instrument upon principle.

1st. With reference to the person executing it. 2dly. as to the legal operation of its expressions.

All agents, acting as such, for avowed principals, only bind their principals; but it must be admitted that they are competent to bind *themselves*, as well as their principals, *if they use apt and adequate words.*

Government can not carry on its operations but through agents, who are distinguished as its officers. I admit that an officer of government, *contracting as such*, for government, is not personally liable. The law neither creates nor implies any liability on the officer; but he *may* make himself individually liable *by his express promise and contract.* 1. *Term rep.* 181. *Macbeath v. Haldimand.* There is nothing then in the character of secretary of war, that prevents him from using words that will render him liable. This leads to the *second question*, which is whether he *has* used such words.

This lease is for eight months; but if for eight years, the same law must govern its construction. I hold it an undeniable position that Mr. Dexter was not competent to bind his successors in office. If he could not, then the lease must have *some* operation. It can not be intended to be a void lease. If not void, then it enures to Mr. Dexter and his executors. If it enures to them, they

only are liable on the covenant, that is, he in his life-time, and they after him. A much ſtronger caſe exiſts in the books. A biſhop is a corporation ſole; he has *ſucceſſors* technically ſpeaking. Here then is a perſon who has a double capacity, competent to contract in either. So had Mr. Dexter. But, ſay the books, if a leaſe be made to a biſhop and his *ſucceſſors*, it enures to him and his *executors*. 1 *Bac. ab.* 508, *Corporation E.* 4. *Co. Lit.* 46. *(b.)* 12. *Co.* 105. *Corven's caſe.* The word "biſhop" in ſuch a caſe is as much the deſcription of his politic capacity, as the word ſecretary at war in the preſent caſe. A biſhop has legal "*ſucceſſors*;" and is not an habendum "to a "biſhop and his ſucceſſors," as ſtrong as the words "to "the ſaid Samuel Dexter and his ſucceſſors?" If in the caſe of the biſhop ſuch a leaſe would enure to him in his individual capacity, *a fortiori* in the caſe of Mr. Dexter who has no legal ſucceſſors.

Again. The covenant to leave the demiſed premiſes in good repair, is a covenant real. 1 *Bac. ab.* 534, 536. If it be a covenant real and runs with the eſtate and intereſt, then as the eſtate and intereſt paſſes to Mr. Dexter and his executors, he and they only can be bound. Suppoſe the leaſe had been for five years, and a ſtranger had taken poſſeſſion; who could ſupport an ejectment? Not the leſſor, becauſe he had parted with his intereſt: not the ſucceſſor of Mr. Dexter, becauſe he is neither a party nor a privy. Mr. Dexter only could have maintained the action, the eſtate and intereſt being in him. It never was out of him during the term. If the operation of law caſts this leaſe upon Mr. Dexter, he who has the benefit muſt bear the burthen; and he muſt be bound by this covenant to repair which runs with the eſtate.

The defendant's ideas violate all the rules of conſtruction.

1ſt. In a deed, when words of a preciſe import are uſed, you cannot reſort to other expreſſions for a ſuppoſed intent. The word "*himſelf*," in the covenant, is too plain to admit of doubt.

2d. No words ſhall be rejected which can be made to operate. By *their* conſtruction, the word "himſelf,"

HODGSON v. DEXTER.

which has a definite meaning, muſt be rejected, and give way to the word "*ſucceſſors*," which in this inſtrument can have no meaning.

3d. Such conſtruction ſhall be given *ut res magis valeat quam pereat*.

According to our conſtruction the deed is operative; but according to their's it is mere waſte paper.

1ſt. They ſay that Mr. Dexter is not bound.

2d. All muſt agree that his ſucceſſor is not bound.

3d. *Ex conſequenti*, no body is bound.

The caſe of *Unwin v. Wolſely*, 1 *Term rep.* 674, is clearly in our favour. In that caſe the contract was by an officer of government who expreſsly contracted "*on account of his majeſty*," and covenanted "*on account of the king*," that "*government ſhould be anſwerable.*" In our caſe there are no ſuch words, nor any thing, except the ſtyling himſelf *ſecretary at war*, and uſing the term *ſucceſſors*, which can poſſibly indicate any intention to bind the government.

2*d point.*

The firſt plea in bar is bad. The matter is inſufficient to bar the plaintiff from his action. The ſubſtance of it is that the houſe was burnt without the negligence or other default of the defendant. This is no anſwer to an expreſs covenant. Due care and diligence is nothing more than every bailee for hire, where there is no expreſs agreement, is bound to uſe. The plea puts in iſſue the negligence or default of the defendant, and throws the *onus probandi* on the plaintiff to ſhow actual negligence; whereas the defendant ought to ſhow ſuch an inevitable caſualty as to bring himſelf within the benefit of the exception. He ſtates that the fire happened without his default from ſome cauſe to him unknown; but it does not thence follow that the deſtruction of the houſe was inevitable. It is immaterial whether it happened with his knowledge and will or without. The plea does not

bring in iſſue the fact whether the deſtruction was inevitable, or not; but only whether it happened with his knowledge and by his default.

Default or negligence means the want of ordinary care.

3d point.

The merits of this plea have already been diſcuſſed in ſpeaking of the word "ſucceſſors," in the leaſe. The demurrer here is not by the plaintiff to the defendant's plea; but by the defendant to the plaintiff's replication; but if the replication is bad, yet if the plea is bad, judgment muſt be for the plaintiff, unleſs the court ſhould be of opinion that the *declaration* alſo is bad, in as much as it is not ſupported by the indenture of which a profert is made, whereby it becomes part of the declaration. In that caſe the fate of this demurrer muſt depend upon the queſtion of perſonal liability of the defendant.

Dexter, contra.

1ſt. It is admitted by Mr. Key, that the defendant had a right to make a public contract and thereby to bind the government; and we admit that he was alſo competent to bind himſelf. The queſtion then is whether this is a public contract; or whether the defendant has bound himſelf perſonally. In addition to the internal evidence of the deed itſelf, the plea ſtates other material facts which are admitted by the demurrer, and which tend to prove the intention and underſtanding of the parties at the time of contracting. Theſe facts are 1ſt, The order of the Preſident, purſuant to law, to remove the offices to Waſhington. 2d, Their conſequent removal. 3d, The neceſſity of providing a houſe in which they might be held. 4th, That for theſe purpoſes, and for no other purpoſe whatever, the buildings were *by the plaintiff* leaſed to the defendant. 5th, That the defendant was at that time ſecretary of the department of war. Theſe facts ſhew the authority which the defendant had to bind the government, and the purpoſe for which the contract was made. The contract, then, being made by a public officer of the government, having authority therefor, and for the uſe of the government, is *primâ*

HODGSON v. DEXTER.

facie a public, and not an individual, contract. The queſtion then is, whether the defendant has pledged his individual credit, in addition to that of his government. This depends upon the intention of the parties; for the intention of the parties in all caſes conſtitutes the contract. This intention is to be known by the words they have uſed; but if thoſe words are doubtful, reſort may be had to other facts, ſuch as the ſubject matter of the agreement, the purpoſe for which it was made, and the official character of the parties, or either of them. But in the preſent caſe the words of the inſtrument itſelf ſeem to leave no room to doubt. In the premiſes, the defendant is ſtyled *ſecretary at war*, and throughout the whole deed, when he is mentioned, he is called the *ſaid* Samuel Dexter, referring to the official deſcription contained in the premiſes; and in the concluſion it is ſaid that the *ſaid* parties have thereunto ſet their hands and ſeals. The word "*ſucceſſors*" alſo is uſed wherever the name of the defendant occurs in the inſtrument; and, whether he was competent to bind his ſucceſſors or not, yet it ſhews the intention of the parties, and the character in which the defendant meant to contract. It ſhews alſo who was to occupy the premiſes after the defendant ſhould ceaſe to be ſecretary at war. The plaintiff himſelf alſo has clearly ſhown what his underſtanding was at the time, by covenanting on his part that the *ſucceſſors* of the defendant ſhould quietly occupy and enjoy the premiſes during the term. This ſhows that the plaintiff underſtood he was contracting with a public officer, for public purpoſes. But great ſtreſs is laid upon the word "himſelf." The ſaid Samuel Dexter, for *himſelf* and his ſucceſſors, covenants to keep the premiſes in repair. *How* does he covenant for himſelf? Clearly for himſelf while in office, and as the repreſentative of the government, his principal. The ſame arguments which ſhow this to be a public contract, explain and limit the meaning of the word *himſelf*. Who is "himſelf?" The *ſaid* Samuel Dexter. Who is the *ſaid* Samuel Dexter? The premiſes ſay, Samuel Dexter, *ſecretary at war*.

The caſe of *Macbeath v. Haldimand*, 1 *Term rep.* 172, is a much ſtronger caſe againſt the individual, than the preſent, and yet the court had no heſitation in declaring it to be a public contract, and that the individual was

not liable. In that caſe nothing was ſaid expreſsly of contracting on account of the government, or for himſelf and his ſucceſſors. In order to ſhew that the defendant meant to pledge his individual credit in addition to that of his government, the plaintiff ought to make out a very ſtrong caſe, in expreſs terms; for if public agents are to be made liable upon preſumptions ariſing from equivocal expreſſions, no prudent man will undertake to conduct the public buſineſs, where, of neceſſity, contracts muſt be made to an immenſe amount. If a doubt exiſts, the conſtruction ought certainly to be in favour of the agent. The caſe of *Unwin v. Wolſeley*, 1. *Term rep.* 674, clearly ſhows that no difference, in the conſtruction of the contract, can ariſe from the circumſtance of its being under ſeal.

The intention of the contract being to bind the government, it ſhall not, by reaſon of the ſeal, become the contract of the individual who did not mean to bind himſelf. The only operation of the ſeal is to raiſe the agreement from a ſimple contract to a ſpecialty. The ſeal therefore does not make it the deed of the individual. It is immaterial whether the words "*on account of his majeſ-*" *ty*," make the caſe of *Unwin v. Wolſeley*, a ſtronger caſe in favour of that defendant, than the preſent. The caſe is not cited to compare thoſe facts with theſe, but to ſhow that the ſeal makes no difference between that caſe and the caſe of *Macbeath v. Haldimand.*

2*d. Point.* Inevitable caſualty.

The objections to this plea ſeem to be, that it throws the *onus probandi* upon the plaintiff; and that the facts do not ſhow an inevitable caſualty.

The plea has ſtated all that was poſſible to ſtate; all that was within our knowledge; and if they do not ſhow the caſe to be *prima facie* within the exception of the covenant, the plea is bad. No form of plea which the defendant could have pleaded, as to this point, would have laid the *onus probandi* on him.

The exception of *inevitable caſualties* is in its nature a negative. One of the counts in the declaration avers the

HODGSON v. DEXTER.

deſtruction of the buildings to have been by an *evitable* caſualty. Upon this averment the defendant might have taken iſſue, and ſaid it was *not* by an evitable caſualty, or in the words of the leaſe, that it was by an *in*evitable caſualty, which is equally a negative propoſition; and in either caſe the proof would lay on the plaintiff. So if the defendant had pleaded that the accident happened notwithſtanding he had uſed the utmoſt care and diligence to prevent it; the plaintiff muſt have replied ſome act of negligence. For it can not be ſuppoſed that the defendant ſhould ſhow particular inſtances of his care for every moment of his occupation during the whole term. Suppoſe the defendant had pleaded, that the fire aroſe by accident in the adjoining houſe and communicated to the houſe in queſtion; (This example is aſſumed under an impreſſion that ſuch was the fact;) would that have been more ſatisfactory to the plaintiff than the preſent plea? He would ſtill have to ſhew that the defendant had not uſed reaſonable means to avoid its effects.

In the caſe of *Monk v. Cooper*, 2. lord Raym. 1477, the form of pleading is not more certain than the preſent; and is the form which has been ever ſince uſed in caſes of deſtruction by fire.

It is underſtood that the learned gentleman who is to cloſe this argument has given an opinion, and means to contend, that *inevitable caſualty* means the act of God.

But ſurely it can not mean an accident only evitable by the power of the ſupreme being. Death is uſually termed the act of God; but death may be by human means which may often be avoided; as in the caſe of murder. So death may be the conſequence of unſkilfulneſs of the phyſician, and might have been avoided by employing a man of more ſkill. So a man by expoſing himſelf to a ſtorm may take cold, and death may enſue; which might have been avoided by not expoſing himſelf to the ſtorm. Yet in all theſe caſes the death is ſaid to be the act of God. An inevitable caſualty therefore is not always the act of God; but muſt mean, in the preſent caſe, a caſualty inevitable by the defendant. It cannot mean a caſualty evitable only by the united exertions of the whole human race. A whirlwind is ſaid to be the

act of God, yet its effects may be prevented by building a wall of braſs about the houſe of ſufficient ſtrength. So the effects of lightning may be prevented by proper conductors; and the ravages of enemies may be impeded by a ſufficient human force. Theſe examples are cited to ſhow that the term *inevitable caſualty* can not be confined to thoſe accidents which are uſually termed the acts of God; nor to ſuch as are inevitable notwithſtanding the united exertions of all the world. Where, then, is the line to be drawn?

HODGSON v. DEXTER.

It is believed that the true meaning of the expreſſion is, ſuch accidents as can not be prevented by *reaſonable care and diligence.*

But even taking the expreſſion to be confined only to thoſe accidents which are called the act of God, yet there are not wanting old authorities which expreſsly call a ſudden fire the act of God, although more modern writers have very properly termed it an *inevitable accident.* 1. *Rolls. ab.* 808. *pl.* 6. under the head of "what acts "ſhall excuſe an eſcape," ſays, "ſo if the priſoners eſ- "cape by *ſudden fire*, this ſhall excuſe the eſcape, *for this* "*is the act of God.*" And in *Dyer* 66. *(b.)* 15. it is ſaid "if he plead that the priſon was broken by enemies "of the king, *or by ſudden fire, which is the act of God*, or "by ſuch force or vehement power that he could not re- "ſiſt, this is good matter."

The caſe of *Forward v. Pittard*, 1. *Term rep.* 27, is a very ſtrong one upon this point. There was a verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe. That the defendant was a common carrier from London to Staftesbury. That on Thurſday the 14th October 1784, the plaintiff delivered to him on *Weybill* twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shafteſbury by his public road waggon, which travels from London, through Andover, to Shafteſbury. That by the courſe of travelling, ſuch waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, *a fire broke out in a booth*, at the diſtance of about 100 yards from the booth in which the defendant had depoſited the hops,

HODGSON v. DEXTER.

which burnt for ſome time with unextinguiſhable violence, and during that time communicated itſelf to the ſaid booth in which the defendant had depoſited the hops, and entirely conſumed them *without any actual negligence in the defendant. That the fire was not occaſioned by lightning.*"

The counſel for the plaintiff in that caſe contended that a *carrier* is liable in all caſes *except the loſs be occaſioned by the act of God or the king's enemies;* and a diſtinction is taken between the act of God and *inevitable accident.*

The counſel for the defendant inſiſted that he was not liable for accidents happening without *any* default or negligence of the carrier.

Lord Mansfield ſaid there was "a nice diſtinction be- "tween the act of God, and inevitable neceſſity. In "theſe caſes (of common carriers) actual negligence is "not neceſſary to ſupport the action."

Afterwards lord Mansfield delivered the *unanimous* opinion of the court. "It is laid down that a carrier is "liable for *every accident;* except by the act of God, or "the king's enemies. Now what is the act of God? "I conſider it to mean ſomething in oppoſition to the "act of man: for every thing is the act of God that "happens by his permiſſion; every thing by his know- "ledge. But to prevent litigation, colluſion, and the "neceſſity of going into circumſtances impoſſible to be "unravelled, the law preſumes againſt the carrier, unleſs "he ſhows it was done by the king's enemies, or by ſuch "act as could not happen by the intervention of man, as "ſtorms, lightning and tempeſts."

"If an armed force come to rob the carrier of the goods "he is liable; and the true reaſon is for fear it may give "room for colluſion, that the maſter may contrive to be "robbed on purpoſe, and ſhare the ſpoil.

"In this caſe it does not appear *but that the fire aroſe* "*from the act of ſome man or other. It certainly did ariſe* "*from ſome act of man; for it is expreſsly ſtated not to have* "*happened by lightning.* The carrier therefore in this caſe "is liable, *inaſmuch as he is liable for inevitable accident.*"

The court in that case call a fire *arising from the act of man*, an inevitable accident, but decide, that the carrier is liable, *inasmuch* as he is liable for *inevitable accident; being considered as an insurer.* There the case shews that the fire arose *from the act of man;* but inasmuch as it was without any default of the carrier, the court called it an *inevitable accident.* In the present case, the plea states, that *against the will* and *without the negligence, or other default of the defendant*, the building was consumed by fire *arising from some cause, then and yet wholly unknown to the defendant.* The only difference in the two cases is, that in the case of the carrier, the fire appeared to have arisen from the act of man, but in the present case, the cause of the fire is wholly unknown. If the former was justly called an *inevitable accident, a fortiori*, the latter ought to be so called.

In *Comyn's rep.* 631, destruction by fire is admitted by the counsel on both sides, to be an *unavoidable accident.*

In *Jones on bailment*, a work remarkable for the correctness and precision of its language, *p.* 90, *American Ed. (p. 49 of English Ed.)* is this expression, "if they be destroyed by wreck, pillage, *fire, or other inevitable misfortune.*" In page 93, (51,) he cites a paragraph from Puffendorf, "that the borrower ought to indemnify the lender, if the goods lent be destroyed by *fire*, shipwreck, *or other inevitable accident.*" In page 97, (53,) he says, "there are other cases, in which a borrower is chargeable for *inevitable mischance; for example*, if the house of Caius be *in flames*, and he be able to secure one thing only," &c. And in p. 142, (78,) "there is no obligation in the bailee to suggest wise precautions against *inevitable accident*, and he cannot, *therefore*, be obliged to advise *insurance from fire.*" In page 146, (79, 80,) he says "although *the act of God* be an expression, which too long custom has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident.*" See also p. 135, (73,) 146, (79, 80,) 149, (81, 82,) 32, (18,) as to the peculiar law respecting innkeepers and common carriers, and as to the general principle that the bailee is liable only for negligence, the degree of which is regulated by the nature of the bailment.

HODGSON v. DEXTER.

The authorities thus cited ſhew that fire in former times was called the act of God, but in latter days it is termed, in the very expreſſions of the leaſe, an inevitable accident, an inevitable caſualty, an inevitable miſchance, or an unavoidable accident, by lawyers, by judges, and by elementary writers. The preſumption therefore is ſtrong, that the caſe of fire was the very caſe of inevitable caſualty, which the exception in the leaſe was intended to guard againſt.

3d. As to the third point.

It is immaterial whether this be conſidered as the contract of the *officer* in his official capacity, or of the government, and whether an action will or will not lay againſt the ſucceſſor. That queſtion can only be of importance as it concerns the *mode* of the remedy, but does not affect the point of perſonal liability. It would be ruinous not only to the agent, but to the government itſelf, if this doctrine of individual reſponſibility is to be eſtabliſhed. Suppoſe the defendant or his ſucceſſor had been diſpoſſeſſed by the plaintiff during the term, who would have the right of action? If the defendant after he was out of office had the ſole right to ſue, the office muſt be at his mercy. He might releaſe the contract. Suppoſe a contract made by the ſecretary at war, for ſupplying the army, and advances as uſual made to the contractor. Suppoſe the ſum advanced to be 50,000 dollars, (which in ſuch caſes is not a large ſum,) and the contractor pockets the money and refuſes to make the ſupplies. The ſecretary becomes bankrupt, or refuſes to bring ſuit, or dies and his executors refuſe to ſue. How are the public to compel them? Is it conſiſtent with the dignity of the United States to aſk their leave to bring ſuit? There is now exiſting a contract for the caſting of cannon, made by the defendant while in office. Can the ſecretary out of office releaſe this contract? Can he give a valid releaſe of the contract for ſupplies to the army?

Theſe examples ſhow, that the ex-ſecretary is not the perſon contracting, and that the ſuit is brought againſt the wrong perſon.

Maſon, on the ſame ſide, was ſtopped by the court, who ſaid they were ſatisfied with the argument on the

part of the defendant, upon the first point, and wished to hear the counsel in reply. Mr. Martin observed, that he did not suppose that any thing he had to offer would shake the opinion which the court seemed to have formed, and should not insist upon replying.

March 2d. *The Chief Justice*, after stating the terms of the lease, and the pleadings, delivered the unanimous opinion of the court.

The plaintiff in error has made two points.

1st. That under this contract, the defendant was bound in his private capacity.

2dly. That the matter, pleaded in his plea, did not shew the casualty, by which the buildings were destroyed, to have been inevitable.

This court give no opinion on the second point, being unanimous in favor of the defendant on the first.

It appears, from the pleadings, that congress had passed a law authorizing and requiring the president to cause the public offices to be removed from Philadelphia to Washington; in pursuance of which law, instructions, by the president, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war office, and that for this purpose, and no other, the agreement was entered into by the defendant who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority; his contracts made on account of the government, are public and not personal.

They enure to the benefit of, and are obligatory on the government; not the officer.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to be-

HODGSON v. DEXTER.

come a public agent, if he ſhould be made perſonally reſponſible for contracts on the public account. This ſubject was very fully diſcuſſed in the caſe of Macbeath v. Haldimand cited from firſt term reports; and this court conſiders the principles, laid down in that caſe, as conſonant to policy, juſtice and law.

The plaintiff has not controverted the general principle, but has inſiſted, that, in this caſe, the defendant has, by the terms of his contract, bound himſelf perſonally.

It is admitted that the houſe was taken on account of the public, in purſuance of the proper authority; and that the contract was made by the perſon at the head of the department, for the uſe of which it was taken; nor is there any allegation, nor is there any reaſon to believe, that the plaintiff preferred the private reſponſibility of the defendant, to that of the government; or that he was unwilling to contract on the faith of government. Under theſe circumſtances, the intent of the officer to bind himſelf perſonally muſt be very apparent indeed, to induce ſuch a conſtruction of the contract.

The court can perceive no ſuch intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government.

The official character of the defendant is ſtated in the deſcription of the parties This, it has been ſaid, might be occaſioned by a willingneſs in the defendant to deſcribe himſelf by the high and honorable office he then filled. This, unqueſtionably, is poſſible, but is not the fair conſtruction to be placed on this part of the contract, becauſe it is not uſual for gentlemen, in their private concerns, to exhibit themſelves in their official character.

The tenement is let to "the ſaid Samuel Dexter and "his *ſucceſſors*;" an expreſſion plainly evidencing that it was not for himſelf, otherwiſe than as ſecretary of war; and that the leſſor ſo underſtood the contract. It is alſo evincive of the correctneſs of the obſervation of the defendant, that the words "ſaid Samuel Dexter," refer to him in his official character, as deſcribed in the premiſes. The habendum is "to have and to hold the ſaid demiſed

"premiſes to him the ſaid Samuel Dexter and his *ſucceſ-* "*ſors*," &c. ſhowing, that to the knowledge of the leſſor, if Mr. Dexter ſhould go out of office the next day, the ſucceſſor to the war department would ſucceed alſo to the occupancy of the office.

The covenant for quiet enjoyment during the term is with the ſaid Samuel Dexter and his *ſucceſſors*, and is, that they, as well as he, ſhall enjoy.

The covenant on the part of Mr. Dexter, on which the ſuit is brought, is for himſelf and his *ſucceſſors*.

The whole face of the agreement then manifeſts very clearly a contract made entirely on public account, without a view, on the part of either the leſſor or leſſee, to the private advantage or reſponſibility of Mr. Dexter.

The only circumſtance which could excite a doubt was produced by the technical operation of the ſeal. This, in plain reaſon and common ſenſe, can make no difference in deſignating the perſon to be reſponſible for the contract; and ſo it has been determined in the caſe cited from the *1ſt Term rep.* 674, *(Unwin v. Wolſeley.)*

The court is unanimouſly and clearly of opinion, that this contract was entered into entirely on behalf of government, by a perſon properly authorized to make it, and that its obligation is on the government only.

Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he muſt reſort to have them ſatisfied.

Judgment affirmed with coſts.

LLOYD *v.* ALEXANDER ET AL.

THE writ of error in this caſe was quaſhed becauſe it was not *accompanied* by a *citation*.

A citation muſt accompany the writ of error.

LLOYD v. ALEXANDER ET AL.

Marſhall, Chief juſtice. The law reſpecting the thirty days notice on a writ of error, and the ten days allowed for filing it, was predicated upon the exiſting ſtate of things at the time of paſſing the act; at which time there was no circuit court whoſe term would not be finiſhed more than forty days before the ſetting of the ſupreme court.

The times of the ſeſſion of the courts have been altered, but no alteration has been made in the law reſpecting the thirty days notice, which makes it difficult to form a rule in the caſe.

At preſent, if the citation has not been ſerved thirty days, the court will not take up the cauſe until the thirty days have expired, unleſs the defendant in error ſhall appear.

A citation not ſerved is as no citation.

APPENDIX.

Note (A.)

THE queſtion of liability of a remote indorſer of a promiſſory note, in Virginia, came before the court below about a year before their deciſion in the preſent caſe. It was in the caſe of *Dunlop v. Silver and others*, argued at July term 1801 in Alexandria. The court took the vacation to conſider the caſe, and examine the law, and at the ſucceeding term judgment was rendered for the plaintiff by Kilty, chief judge, and Cranch, aſſiſtant judge, contrary to the opinion of judge Marſhall.

The caſe was this. James Cavan made a promiſſory note, by which he promiſed to pay to Silver et al. or order, ſixty days after date, 600 dollars for value received, negotiable at the bank of Alexandria. Silver et al. indorſed the note to Downing and Dowell in theſe words, "pay the contents to Downing and Dowell," who indorſed, "pay the "contents to John Dunlop or order." Dunlop had obtained judgment on the note againſt Cavan, the maker, who was taken upon the execution, and took the oath of an inſolvent debtor.

The declaration had two counts. 1ſt. A ſpecial count ſtating the making and indorſing the note, the ſuit, judgment, execution and inſolvency of Cavan, by reaſon whereof the defendant became liable, &c. 2dly. *Indebitatus aſſumpſit* for money *had and received.*

The plea was *non aſſumpſit*, and a verdict was taken for the plaintiff, ſubject to the opinion of the court upon the point, whether the holder can maintain an action againſt the remote indorſer of a promiſſory note.

The ſtatute of 3 and 4 Anne, c. 9, reſpecting promiſſory notes, is not in force in Virginia; but there is an act of aſſembly, 1786, chap. 29, by which it is enacted that "an action of debt may be maintained upon a "note or writing, by which the perſon ſigning the ſame ſhall promiſe "or oblige himſelf to pay a ſum of money, or quantity of tobacco, to

" another;" and that " aſſignments of bonds, bills and promiſſory " notes, and other writings obligatory, for payment of money or to- " bacco, *ſhall be valid;* and an aſſignee of any ſuch may thereupon " maintain an action of *debt in his own name;* but ſhall allow all juſt " diſcounts, not only againſt himſelf, but againſt the aſſignor, before " notice of the aſſignment was given to the defendant."

It will be obſerved that this act gives no action againſt the indorſer, or aſſignor, nor does it make any diſtinction between notes payable to *order*, and thoſe payable only to the payee. Hence, perhaps, it may be inferred that it left ſuch inſtruments as the parties themſelves by the original contract had made, (or intended to make,) *negotiable*, to be governed by ſuch principles of law as may be applicable to thoſe inſtruments. At any rate it ſeemed to be admitted that the act did not affect the preſent caſe.

The principal queſtion then is, whether this action could have been ſupported in England before the ſtatute of Anne.

I. In order to aſcertain how the law ſtood before that ſtatute it may be neceſſary to examine how far the cuſtom of merchants, or the *lex mercatoria*, was recognized by the courts of juſtice, and by what means the common law forms of judicial proceedings were adapted to its principles.

(A diſtinction ſeems to have been made very early between the contracts of merchants, (eſpecially of foreign merchants,) and thoſe of other people. Nearly ſix hundred years ago, we find their " *old and right-* " *ful cuſtoms*" protected by the great charter of Engliſh liberties (magna charta, c. 30.) Peculiar privileges were alſo granted them more than 500 years ago, by the ſtatute of Acton Burnel *de mercatoribus*, 11 Ed. 1, and the *ſtatute of merchants*, 13 Ed. 1. And in the reign of Ed. 3d. many ſtatutes were made for their encouragement, in ſome of which, particularly in 27 Ed. 3. c. 19 & 20, the *law merchant* is expreſsly recognized. In the 13th Ed. 4. 9, 10, (cited by Molloy, book 3d. c. 7. §. 15.) it is ſaid that " a merchant ſtranger made ſuit before " the king's privy council, for certain bails of ſilk feloniouſly taken " from him, wherein it was moved that this matter ſhould be deter- " at common law; but the lord chancellor anſwered, *that this ſuit* " *is brought by a merchant who is not bound to ſue according to the law of* " *the land, nor to tarry the trial of twelve men.*")

The cuſtom of merchants is mentioned in 34 *H.* 8. *cited in Bro. ab. Tit. Cuſtoms pl.* 59, where it was pleaded as a cuſtom between mer-

chants throughout the *whole* realm, and the plea was adjudged bad, *becauſe a cuſtom throughout the whole realm was the common law.* And for a long time it was thought neceſſary to plead it as a cuſtom between merchants of particular places, viz. as a cuſtom among merchants reſiding in London and merchants in Hamburgh, &c. By degrees, however, the courts began to conſider it as a general cuſtom. *Co. Lit.* 182. 2. *Inſt.* 404. And in the time of James 1ſt, *Ch. J. Hobart* in the caſe of *Vanheath v. Turner*, *Winch* 24, ſaid, that "the "cuſtom of merchants is part of the common law, of which the "judges ought to take notice." It was ſtill however deemed neceſſary to ſet forth the cuſtom ſpecially; and in that form the precedents continued for ſome time after. Indeed the pleadings continued in that form long after the courts had decided it to be unneceſſary. Lord Coke in his commentary on Littleton, (firſt publiſhed in 1628,) *folio* 182 *(a.)* ſpeaking of the *lex mercatoria*, ſays, "which, as hath been ſaid, "*is part of the laws of this realm.*" See alſo, 2 *Inſt.* 404.

But after this, in the year 1640, in *Eaglechild*'s caſe, reported in *Helty* 167. & *Lit. rep.* 363. 6 *Car.* 1. it was ſaid to have been ruled in B. R. "that upon a bill of exchange between party and party who "were not merchants, there can not be a declaration upon the *law* "*merchant*; but there may be a declaration upon *aſſumpſit*, and give the "acceptance of the bill in evidence." This deciſion ſeemed to confine the operation of the law merchant, not to contracts of a certain deſcription, but to the *perſons* of merchants: whereas the cuſtom of merchants is nothing more than *a rule of conſtruction of certain contracts. Jac. Law dict. Tomlin. Tit. cuſtom of merchants.* Eaglechild's caſe, however, was over-ruled in the 18 *Car.* 2. *B. R.* (1666,) in the caſe of *Woodward v. Rowe*, 2 *Keb.* 105, 132, which was an action by the *indorſee* againſt the drawer of a bill of exchange. "The plain- "tiff counted on the cuſtom and law of *the realm*, that if any man "writes a bill to another, then if he to whom the bill is directed, "do not pay for the value received by the maker, the maker of ſuch "bill ſhould pay." "It was moved in arreſt of judgment, that this "count is ill, the *general cuſtom* being the law; and it doth not "appear to the court that there is any ſuch law. *Sed curia contrà*, that "by the *common law*, a man may reſort to him that *received the money*, "if he, to whom the bill was directed, refuſe." It was afterwards moved again that this "is only a particular cuſtom among merchants, "and not *common law*; but *per curiam*, the law of merchants *is the law* "*of the land*; and the cuſtom is good enough generally *for any man*, "*without naming him merchant*; judgment *pro* plaintiff, *per totam cu-* "*riam, and they will intend that he, of whom the value is ſaid to be re-* "*ceived by the defendant, was the plaintiff's ſervant.*"

The ſame principle was, two years afterwards, recognized in an *anonymous* caſe (but believed to be *Milton's* caſe *vid.* 1. *Mod.* 286.) in the exchequer, reported in *Hardres* 485. *Mich.* 20 *Car.* 2*d*, (1668.) Where the plaintiff declared on the *cuſtom of England*, and after verdict, Offley moved in arreſt of judgment, becauſe the "plaintiff "had declared that *per conſuetudinem Angliæ*, &c. which he ſaid was "naught, becauſe the *cuſtom of England* is the *law of England*, and "what the judges are bound to take notice of; and that therefore the "*conſuetudo Angliæ* ought to have been omitted."

But the chief Baron ſaid, "But for the plaintiffs inſerting the cuſ- "tom of the realm into his declaration here, I hold that to the mere "ſurpluſſage and redundancy, which does not vitiate the declaration." And again he ſays, "It were worth while to enquire what the courſe "has been amongſt merchants; or to direct an iſſue for trial of the "cuſtom among merchants in this caſe; for although we muſt *in ge-* "*neral take notice of the law of merchants*; yet all their cuſtoms we "can not know but by information." Afterwards in declaring their opinions the court ſaid "that this courſe of accepting bills being a "*general cuſtom* amongſt all traders both *within* and without the realm, "and having every where that effect to make the acceptor ſubject to "pay the contents, the "court muſt take notice of that cuſtom."

Notwithſtanding theſe deciſions, the queſtion was again made about twenty years afterwards in the caſe of *Carter v. Downiſh*, 1 *W. and M. anno* 1688, 1 *Shower* 127, in the exchequer on a writ of error from the King's Bench. The defendant had covenanted to pay all bills which ſhould be drawn on him in favour of the plaintiff on account of 1000 kentals of fiſh, and the breach aſſigned was the non-payment of a certain bill. The defendant pleaded that the plaintiff by indorſement on the bill, *according to the cuſtom of merchants*, appointed the payment to Herbert Aylwin or his order, who indorſed it to Taſſel, to whom the defendant paid it. To this plea there was a demurrer, and joinder. One of the errors aſſigned was that the defendant had not ſet forth a *particular cuſtom* to warrant the indorſement. To which it was anſwered, "that the law and cuſtom of merchants, warrant "the indorſement of foreign bills of exchange, and for that all the "book caſes on foreign bills are a proof; and that ſuch indorſement "doth really transfer the property of the money, or contents in ſuch "bills, to the indorſee, and that all this *law of merchants is part of the* "*law of the land*, and the judges are obliged to take notice of that "as well as of any other law." And the following caſes were cited, 1 *Inſt.* 182, *(a.)* 2 *Inſt.* 58, 204. *F. N. B.* 117.—*Reg.* 135.—13 *Ed.* 4, 9.—4 *Rep.* 76, *Holland's caſe*—*Fitz. ab. Tit. account*, 127.

Lord chief juſtice Pollexfen. "As to that of the *law of merchants*, I "think *we are bound to take notice of it*, as we do of that of ſurvivor-"ſhip and account, and this is as well known."

Ventris concurred, and they all inclined to reverſe the judgment; but upon Tremayne's importunity, *adjornatur.*

Three years after this, however, the point was again made, in the caſe of *Mogadara v. Holt*, 3 *W. and M.* 1 *Show.* 318, *and* 12 *Mod.* 15. 16. *Anno* 1699, where it was held by Holt, chief juſtice, and the whole court, "that the law of merchants is *jus gentium*, and part of "*common law*, and *ergo*, we ought to take notice of it, when ſet forth "in pleading. And "though the plaintiff hath alleged a cuſtom "contrary to fact, yet that is but ſurpluſage; and *he needed not to* "*have alleged a cuſtom.*" *Jud. pro quer.*

Not ſatisfied with theſe adjudications, the queſtion was again agitated, two years afterwards, in the exchequer, on a writ of error from the king's bench, in the caſe of *Williams v. Williams*, *Carth.* 269. *Paſch.* 5. *W. and M. Anno* 1693, where "the only error inſiſted on "was that the plaintiff had not declared on the cuſtom of merchants "*in London*, or any other particular place, (as the uſual way is) but "had declared *on a cuſtom through all England*, and if ſo, 'tis the *com-*"*mon law*, and then it ought not to be ſet out by way of *cuſtom*; and "if it is a cuſtom, then it ought to be laid in ſome particular place "from whence a *venue* might ariſe to try it. To which it was an-"ſwered, that *this cuſtom of merchants, concerning bills of exchange*, is "part of the *common law*, of which the judges will take notice *ex of-*"*ficio*, as it was reſolved in the caſe of *Carter v. Downiſh*; and there-"fore it is needleſs to ſet forth the cuſtom ſpecially in the declaration, "for it is ſufficient to ſay that ſuch a perſon, *ſecundum uſum et conſue-*"*tudinem mercatorum*, drew the bill; therefore all the matter in the "declaration concerning the ſpecial cuſtom was merely ſurpluſage, "and the declaration good without it. The judgment was affirmed."

Similar doctrine was alſo held by lord Holt, in the ſame term, in the caſe of *Hodges v. Steward*, 12 *Mod.* 37. *Paſch.* 5. *W. and M. Anno* 1693.

Again in *Hillary term*, *B. R.* 8 *and* 9. *W.* 3, *Anno* 1697, *Pinkney v. Hall*, 1 *lord Ray.* 175, the exception was taken, "that the decla-"ration being *per conſuetudinem Angliæ*, &c. was ill, becauſe the cuſtom "of *England* is the law of *England*, of which the judges ought to take "notice without pleading. *Sed non allocatur.* For though heretofore

" this has been allowed, yet of late time it has always been over-rul-
" ed." And another exception was " that though *lex mercatoria* is
" part of the law of England, yet it is but a particular cuſtom among
" merchants; and therefore it ought to be ſhewn in London, or ſome
" other particular place. *Sed non allocatur.* For the cuſtom is not re-
" ſtrained to any particular place.

The ſame principles were, in the ſame term, in the *common pleas*, held in the caſe of *Bromwich v. Loyd*, *Hillary term*, 8. *W.* 3. 2 *Lutw.* 1585, where *Treby*, *chief juſtice*, ſaid " That bills of exchange at firſt
" were extended only to *merchants ſtrangers*, and afterwards to *inland*
" bills between merchants trading one with another here in England;
" and after that to all *traders and dealers*, and of late to *all perſons*,
" *trading or not: and there was no occaſion to allege any cuſtom;* and that
" was not denied by any of the other juſtices."

In the *10th of W.* 3. *Anno* 1698, *B. R.* 1 *lord Ray.* 360, *Hawkins v. Cardy*, an action was brought on a promiſſory note made by the defendant and indorſed by the payee to the plaintiff for part only, who declared on the cuſtom of merchants for ſuch an indorſement. But on demurrer it was adjudged ill. " For a man cannot apportion ſuch
" perſonal contract, for he cannot make a man liable to two actions,
" where by contract he is liable but to one." And Holt, chief juſtice, ſaid " this is not a particular local cuſtom, but the *cuſtom of merchants*,
" *of which the law takes notice;* and therefore the court cannot take
" the cuſtom to be ſo."

Judgment for defendant.

Four years after this, in the caſe of *Buller v. Crips*, 2 *Anne*, *B. R.* 6 *Mod.* 29, *Anno* 1702, lord Holt ſaid, " I remember when actions
" upon inland bills of exchange did firſt begin; and there they laid a
" particular cuſtom between *London and Briſtol*, and it was an action
" againſt the acceptor. The defendant's counſel would put them to
" *prove the cuſtom;* at which Hale, who tried it, laughed and ſaid,
" *they had a hopeful caſe on't.* And in my lord North's time it was ſaid,
" that the cuſtom *in that caſe* was *part of the common law of England*,
" and the actions ſince became frequent as the trade of the nation did
" encreaſe; and all the difference between foreign and inland bills is,
" that foreign bills muſt be proteſted before a public notary, before
" the drawer may be charged; but inland bills need no proteſt."

In the year 1760, in the caſe of *Edie v. the E. India Company*, 1 *G.* 3, 2 *Bur.* 1226, *Mr. juſtice Foſter* ſaid, " much has been ſaid about the

" cuſtom of merchants; but *the cuſtom of merchants*, or law of mer-
" chants, *is the law of the kingdom*, and is *part of the common law*. Peo-
" ple do not ſufficiently diſtinguiſh between cuſtoms of different ſorts.
" The true diſtinction is between *general* cuſtoms (which are part of
" the common law) and *local* cuſtoms, (which are not ſo.) This cuſ-
" tom of merchants is the *general law of the kingdom, part of the common*
" *law*, and therefore ought not to have been left to the jury, *after* it has
" been already ſettled by judicial determinations." And in the ſame
caſe, p. 1228, Mr. juſtice Wilmot ſays, " The *cuſtom of merchants is*
" *part of the law of England*; and courts of law muſt take notice of it
" as ſuch. There may indeed be ſome queſtions, depending upon
" cuſtoms among merchants, where if there be a *doubt about the cuſtom*,
" it may be fit and proper to take the opinion of merchants thereupon;
" yet that is only where the *law* remains doubtful. And even there
" the cuſtom muſt be proved by *facts*, not by opinion only; and it
" muſt alſo be ſubject to the controul of law."

In the caſe of *Pillans and Roſe v. Van Mierop and Hopkins*, 3, *Bur.* 1669, *lord Mansfield* ſays, " *The law of merchants, and the law of the land*
" *is the ſame.* A witneſs cannot be admitted to prove the law of mer-
" chants. We muſt conſider it as a point of *law*."

Sir Matthew Hale, in his hiſtory of the common law of England, firſt publiſhed in 1713, *3d Ed. p.* 24, 25, ſpeaking of the common law, as it is taken in its *proper and uſual* acceptation, ſays, " And be-
" ſides theſe more common and ordinary matters to which the com-
" mon law extends, it likewiſe includes the laws applicable to divers
" matters of very great moment; and though by reaſon of that appli-
" cation, the ſaid common law aſſumes diverſe denominations, yet they
" are but branches and parts of it; like as the ſame ocean, though it
" many times receives a different name from the province, ſhire, iſland,
" or country to which it is contiguous, yet theſe are but parts of the
" ſame ocean.

" Thus the common law includes, *lex prerogativa*, as it is applied
" with certain rules to that great buſineſs the king's prerogative; ſo
" it is called *lex foreſtæ*, as it is applied under its ſpecial and proper
" rules to the buſineſs of foreſts; *ſo it is called lex mercatoria, as it is*
" *applied under its proper rules, to the buſineſs of trade and commerce.*"

To theſe authorities will be added only that of *Chriſtian* in his note " to 1 *Bl. Com.* 75. " The *lex mercatoria*, or cuſtom of merchants,
" like the *lex et conſuetudo parliamenti*, deſcribes only a great diviſion of
" the law of England. The laws relating to bills of exchange, inſu-

" rance, and all mercantile contracts, are as much *the general laws of* " *the land*, as the laws relating to marriage, or murder."

This chronological liſt of authorities tends to elucidate the manner in which the cuſtom of merchants gained an eſtabliſhment in the courts of law, as part of the common or general law of the land; and ſhews that it ought not to be conſidered as a ſyſtem *contrary* to the common law, but as an eſſential conſtituent part of it, and that it always was of coequal authority as far as ſubjects exiſted for it to act upon. The reaſon why it was not recognized by the courts, and reduced to a regular ſyſtem as ſoon as the laws relating to real eſtate and the pleas of the crown, ſeems to be, that in ancient times the queſtions of a mercantile nature, in the courts of juſtice, bore no proportion to thoſe relating to the former ſubjects. (Before the time of James 1ſt, we have ſcarcely a mercantile caſe in the books;) and yet long before that time, the laws reſpecting real eſtates and the criminal code were nearly as well underſtood as they are at this day. Hence it cannot be a matter of great ſurprize, that the principles of commercial law which have been developed by the exigencies of modern times, ſhould have been, by ſome, conſidered as exceptions from the general principles of the common law. The truth ſeems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of thoſe commercial principles, but that theſe principles have exiſted from the earlieſt times, even from the rudeſt ſtate of commerce, and the only reaſon why we do not find them in the ancient books, is, that the circumſtances had never occurred which rendered it neceſſary to draw them forth into judicial deciſion.)

Another reaſon perhaps why we ſee ſo much tardineſs in the courts in admitting the principles of commercial law in practice, has been the obſtinacy of judicial forms of proceſs, and the difficulty of adapting them to thoſe principles which were not judicially eſtabliſhed until after thoſe forms had acquired a kind of ſanctity from their long uſe. Much of the ſtability of the Engliſh juriſprudence is certainly to be attributed to the permanency of thoſe forms; and although it is right that eſtabliſhed forms ſhould be reſpected, yet it muſt be acknowledged that they have in ſome meaſure obſtructed that gradual amelioration of the juriſprudence of the country which the progreſſive improvement of the ſtate of civil ſociety demanded. It required the tranſcendent talents and the confidence in thoſe talents, which were poſſeſſed by lord Mansfield, to remove thoſe obſtructions. When he aſcended the bench he found juſtice fettered in the forms of law. It was his taſk to burſt thoſe fetters, and to tranſform the chains into inſtruments of ſubſtantial juſtice.

From that time a new æra commenced in the hiſtory of Engliſh juriſprudence. His ſagacity diſcovered thoſe intermediate terms, thoſe minor propoſitions, which ſeemed wanting to connect the newly developed principles of commercial law, with the ancient doctrines of the common law, and to adapt the accuſtomed forms to the great and important purpoſes of ſubſtantial juſtice, in mercantile tranſactions.

II. Forms of pleading often tend to elucidate the law. By obſerving the forms of declarations which have, from time to time, been adopted in actions upon bills of exchange, we may perhaps diſcover the ſteps by which the courts allowed actions to be brought upon them as ſubſtantive cauſes of action, without alleging any conſideration for the making or accepting them. The firſt forms which were uſed take no notice of the cuſtom of merchants as creating a liability diſtinct from that which ariſes at common law; but, by making uſe of ſeveral fictions, bring the caſe within the general principles of actions of aſſumpſit. The oldeſt form, which is recollected, is to be found in *Raſtell's Entries, fol.* 10. (*a.*) under the head "action on the caſe upon "promiſe to pay money." Raſtell finiſhed his book, as appears by his preface, on the 28th of March, 1564, and gathered his forms from four old books of precedents then exiſting. This declaration ſets forth that A. complains of B. &c. for that whereas the ſaid A. by a certain I. C. his ſufficient attorney, factor and deputy in this behalf, on ſuch a day and year at L. at the ſpecial inſtance and requeſt of the ſaid B had delivered to the ſaid B. by the hands of the ſaid I. C. to the proper uſe of the ſaid B. £. 110 8 4 lawful money of England; *for which* ſaid £. 110 8 4 ſo to the ſaid B. delivered, he, the ſaid B. then and there to the ſaid I. C. (then being the ſufficient attorney, factor and deputy of the ſaid A. in this behalf,) faithfully promiſed and undertook, that a certain *John of G.* well and faithfully would content and pay to Reginald S. (on ſuch a day and year and always afterward, hitherto the ſufficient deputy, factor and attorney of the ſaid A. in this behalf,) 443⅔ ducats, on a certain day in the declaration mentioned. And if the aforeſaid John of G. ſhould not pay and content the ſaid Reginald S. the ſaid 443⅔ ducats, at the time above limited, that then the ſaid B. would well and faithfully pay and content the ſaid A. £. 110 8 4 lawful money of England, with *all damages and intereſt thereof*, whenever he ſhould be thereunto by the ſaid A. requeſted. It then avers that the ſaid 443⅔ ducats were of the value of £. 110 8 4 lawful money of England, that John of G. had not paid the ducats to Reginald S. and that if he had paid them "to the ſaid R. I. B. and "their aſſociates, or to either of them, then the ſaid 443⅔ ducats "would have come to the benefit and profit of the ſaid A. Yet the "ſaid B. contriving the aforeſaid A. of the ſaid £. 110 8 4 and of

" the damages and intereſt thereof, falſely and ſubtilly to deceive and " defraud, the ſame, or any part thereof, to the ſaid A. although often thereunto required, according to his promiſe and undertaking " aforeſaid, had not paid or in any manner contented, whereby the " ſaid A. not only the profit and gain which he, the ſaid A. with the " ſaid £. 110 8 4 in lawfully bargaining and carrying on commerce " might have acquired, hath loſt; but alſo the ſaid A. in his credit " towards diverſe ſubjects of our lord the king (eſpecially towards R. " H. and I. A. to whom the ſaid A. was indebted in the ſum of " £. 110 8 4 and to whom the ſaid A. had promiſed to pay the ſame " £. 110 8 4 at a day now paſt, in the hope of a faithful performance of the promiſe and undertaking aforeſaid,) is much injured, " to his damage, &c. This declaration ſeems to have been by the indorſee of a bill of exchange againſt the drawer. For although nothing is ſaid of a bill of exchange, or of the cuſtom of merchants, yet the facts ſtated will apply to no other tranſaction. It appears that ducats were to be given for pounds ſterling, this was in fact an exchange; again, the defendant promiſed to re-pay the original money advanced *with all damages and intereſt*; this is the preciſe obligation of the drawer of a bill of exchange, according to the *law merchant*. Beſides, the tranſaction, if literally true as ſet forth in the declaration, was at leaſt a very uncommon one. A. is ſuppoſed to make I. C. his attorney for the purpoſe of paying £. 110 to B. and to receive a promiſe from B. that John of G. ſhould pay to Reginald S. 443 ducats. And A. is alſo ſuppoſed to have made Reginald S. his attorney for the purpoſe of receiving the ducats. Such a tranſaction muſt certainly be very rare, eſpecially as it was ſo much eaſier to have done the ſame thing in ſubſtance by a ſimple bill of exchange.

In the oldeſt books extant in the Engliſh language on the ſubject of the law merchant, viz. *Malynes's lex mercatoria*, written in 1622, and *Marius's advice*, which appeared in 1651, it is ſaid that regularly there are four perſons concerned in the negotiating a bill of exchange. A. a merchant in Hamburgh, wanting to remit money to D. in England, pays his money to B. a banker in Hamburgh, who draws a bill on C. his correſpondent or factor in England, payable to D. in England, for value received of A. But in the declaration above recited there are *five* perſons concerned; and if, as is ſuppoſed, that tranſaction was upon a bill of exchange, the fifth perſon muſt have been an indorſee, or aſſignee of the bill. Another reaſon for ſuppoſing this to be the caſe, is, that Raſtell has no other form of a declaration by an *indorſee*, although he has two by the *payee*, viz. one againſt an acceptor and one againſt a drawer.

In the declaration of *payee v. acceptor*, *fol.* 338. (*a.*) the foreign merchant who paid the 1400 crowns to the drawer of the bill in France, to be remitted to the plaintiff (the payee) in England, is ſtated to be the *plaintiff*'s factor; and the drawer of the bill is ſtated to be the factor of the *defendant* (the acceptor) ſo that the plaintiff, by his factor, is ſuppoſed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in conſideration of which it is averred that the defendant in England, promiſed the plaintiff to pay him £. 414 3 4 lawful money of England.

This declaration ſets forth that whereas the plaintiff on the 10th June, 37 Eliz. at Rochelle in France, in parts beyond ſeas, *by the hands of a certain T. S. then the factor of the plaintiff*; at the requeſt of a certain *R. W. then the factor of the defendant*, delivered and paid to the ſaid R. W. *then the factor of the defendant, to the uſe of the defendant*, as much ready money as amounted to 1400 French crowns, of the money of France, in parts beyond ſea, at the rate of 5*ſ* 11 lawful money of England for each French crown: And thereupon the ſaid R. W. at Rochelle aforeſaid, then delivered to the ſaid T. S. three bills of exchange, viz. firſt, ſecond and third. In the firſt of which bills of exchange the ſaid R. W. requeſted the defendant to pay to the plaintiff at L. £. 414 3 4 lawful money of England, at the end of thirty days next after ſight of that bill of exchange, (the ſecond and third bills of exchange to the plaintiff not paid). It then ſets forth the tenor of the ſecond and third bills, and then avers that the *defendant*, on the day and year firſt aforeſaid, at the city of E. in the county of the ſaid city, *in conſideration thereof* undertook, and to the plaintiff then and there and faithfully promiſed that he, the defendant, well and faithfully would pay to the plaintiff, to the plaintiff's uſe at the city of E. aforeſaid in the county of the ſaid city, *by way of exchange according to the uſage of merchants*, the aforeſaid £ 414. 3. 4 lawful money of England, at the end of thirty days next after ſight of any of the bills of exchange aforeſaid; and the plaintiff in fact ſaith, that afterwards, viz. on the 1ſt September in the year aforeſaid, at, &c. the firſt of the ſaid bills came to the ſight of, and was then and there ſhewn to the defendant, yet the defendant not regarding, &c. but contriving, &c. did not pay the ſaid £. 414. 3. 4, &c. at the end of the ſaid thirty days, &c. Whereby the defendant loſt the benefit of trading with the ſaid £. 414. 3. 4, &c. to his damage £. 600.

In this declaration it will be perceived that the cuſtom of merchants is not alleged as the foundation of the action, or the cauſe of liability of the defendant. Nor is it ſtated that the *defendant* accepted the bill. But the *plaintiff* grounds his action upon the *defendant*'s promiſe to

pay the amount mentioned in the bill, in conſideration of 1400 crowns paid to his uſe in France; and in conſideration that his factor had drawn and delivered the bills to the *plaintiff*'s factor. This idea of factorage is probably a fiction introduced for the purpoſe of adapting the cuſtom of merchants to the common law forms, and to ſhow a ſufficient conſideration for the aſſumpſit. The queſtion of factorage was not traverſable; as the facts of drawing the bill, and the drawee's acceptance, were ſufficient evidence of the drawers being the acceptor's factor *quoad hoc*. This fiction might perhaps be conſidered as part of the cuſtom of merchants; but, at any rate, it ſeems to have been conſidered neceſſary in order to create that degree of *privity* between the payee and the acceptor which *at that time* was ſuppoſed neceſſary to ſupport the action of aſſumpſit.

Both this and the former, are declarations at common law; that is, neither of them is aided by the cuſtom of merchants, unleſs the cuſtom may be conſidered as ſupporting the fiction of factorage. They ſhow alſo that if *privity* of contract was neceſſary at common law to ſupport the action of aſſumpſit, the law would preſume a privity, or at leaſt would preſume facts which conſtituted a privity, between the payee and acceptor, or between an indorſee and a drawer of a bill of exchange.

As in the latter declaration, the original advancer of the money to the drawer in France, is preſumed to be the factor of the payee, (the plaintiff,) ſo in the former, Reginald S. (the payee) and I. C. the original advancer of the money, are preſumed to be the factors of the plaintiff, (the indorſee.)

In 1 *Brownloe's declarations* printed in 1652, p. 267, is a declaration by the payee againſt the acceptor, in which the acceptor is alleged to be the factor of the drawer, but the original advancer of the money is not ſtated to be the factor of the plaintiff, as in the declarations in Raſtell; although it is averred that the original advancer of the money paid it to the drawer *with intent* that it ſhould be paid in England by the drawer's factor (the drawee) to the plaintiff (the payee) which is the ſame thing; for if he paid it with that intent, it was paid for the benefit of the payee.

In the *ſame volume p.* 269 is a declaration by payee *v.* Drawer, in which the advancer of the money is expreſsly ſtated to be the factor of the plaintiff; but the drawee is not alleged to be the factor of the drawer. In both caſes the cuſtom is ſtated to be between Engliſh merchants and foreigners, and their *factors or ſervants*.

Probably at this time it began to be conſidered as unneceſſary to allege the *intermediate* parties on the bill to be the factors of the parties to the action, in as much as it was a mere fiction, the want of which was conſidered as ſupplied by an allegation of the cuſtom.

But in his *ſecond volume*, printed in 1654, p. 58, there is another declaration by the payee v. acceptor of a bill of exchange, in which the payee is called the factor of the advancer of the money, and the drawee the factor of the drawer. There is alſo an averment of the cuſtom. This declaration refers to *Hillary term*, 4 *Jac. Roll* 155, from whence it was probably taken.

In Browne's vade mecum, (*2d Ed.* 1695,) *p.* 12, is a declaration by payee v. acceptor, alleging that the plaintiff himſelf paid the money to the drawer who was the defendant's factor. It alſo ſets forth the cuſtom.

In p. 16, is another by payee againſt acceptor, like that in *Raſtell*, *fol.* 338, (*a*) alleging that the *plaintiff*'s factor beyond ſea, paid the money to the *defendant*'s factor, who drew a bill on the defendant (his maſter,) payable to the plaintiff, who ſhowed and delivered it to the defendant, who *in conſideration thereof*, promiſed to pay, &c.

This is a declaration at common law, and not on the cuſtom. The date of the bill mentioned in the declaration is Sept. 10, 1584, (*26th of Eliz.*) one year before the date of that in Raſtell.

In p. 18, is another declaration at common law by payee v. acceptor of a foreign bill, in the caſe of *Williamſon v. Holiday*, *Trin.* 9. *Jac. Rot.* 712, in which it is alleged that the *plaintiff* by his factor paid the money to the *defendant*'s factor, for which he drew on the *defendant* payable to the *plaintiff*, who ſhowed it to the *defendant*, who accepted it, and *in conſideration of the premiſes* promiſed to pay, &c.

In p. 19, is a declaration by payee v. drawer, in which the *plaintiff* declares that he paid the *defendant* £.45, *for which* the *defendant* drew and delivered to the *plaintiff*, a bill of exchange on a certain Thomas Cole, at Venice, requiring him to pay to the *plaintiff* for the *defendant*, 200 ducats, at 2 days ſight; and *in conſideration of the premiſes* undertook and promiſed that he would, *by the hands of the ſaid Thomas Cole, in Venice*, pay to the *plaintiff* the ſaid 200 ducats. He then avers that he ſhowed the bill to Cole, who refuſed to pay, yet the defendant had not, by the hands of the ſaid Cole, nor in any other manner paid the ducats, &c.

In p. 21, is a declaration at common law by the original advancer of the money to whoſe uſe the money was to be paid by way of exchange, againſt the drawer. It alleges that the plaintiff paid the defendant at his requeſt, £. 100, lawful money of England, for which the *defendant* drew a bill on I. W. at Middleburgh, requiring him to pay at uſance, to one George Chandler, *or bearer, to the uſe of the plaintiff*, £. 174 11 0 Flemiſh; and that *in conſideration of the premiſes* the defendant undertook, &c. that if the ſaid I. W. ſhould not accept the bill, nor pay the £. 174 11 0 Flemiſh, according to the tenor of the bill, then the *defendant* would pay the *plaintiff* the original ſum advanced, viz. £. 100, lawful money of England. It then avers, that I. W. did not accept nor pay; and a proteſt for non-acceptance and notice to defendant; yet he has not paid the £. 100, &c.

Theſe are the greater part of the precedents of declarations on bills of exchange, to be found in the printed books before the ſtatute of Anne; and in all of them thoſe facts are ſtated which bring the caſe within the principles which were conſidered as neceſſary to ſupport the action of aſſumpſit in general caſes at common law. In the more modern forms the liability of the defendant under the cuſtom, is conſidered as a ſufficient conſideration to raiſe an aſſumpſit without averring thoſe intermediate ſteps which may be conſidered as the links of the chain of *privity* which connects the plaintiff with the defendant. The reaſon of this change of form was probably the conſideration that thoſe intermediate links were only fictions, or preſumptions of law, which were never neceſſary to be ſtated.

Theſe authorities tend to ſhow, that in mercantile tranſactions privity is not neceſſary to the foundation of an action; or that if it is, the law will preſume a privity. It will be ſeen in the courſe of theſe obſervations that privity is not neceſſary to ſupport the action for money had and received, in any caſe.

III. Having thus ſeen how the law merchant was underſtood at the time of the ſtatute of Anne, and the manner in which it was applied to the forms of judicial proceſs, it will now be neceſſary to enquire at what time the law merchant was conſidered as applicable to *inland* bills, and what was the law reſpecting *ſuch* bills and promiſſory notes, prior to the ſtatutes of 9 *and* 10 *W.* 3, *c.* 17, *and* 3 *and* 4 *Anne*, *c.* 9.

It is not aſcertained exactly at what time *inland bills* firſt came into uſe in England, or at what period they were firſt conſidered as entitled to the privileges of bills of exchange under the law merchant. But there was a time when the law merchant was conſidered as "confined

" to cases where one of the parties was a merchant stranger," 3 *Woodeson* 109, and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. This seems to have been the case at the time when Malynes wrote his *lex mercatoria*, in the 4th page of which he says "He that *continually* " dealeth in buying and selling of commodities, or by way of permu- " tation of wares, *both* at home *and abroad in foreign parts*, is a mer- " chant." It may be observed also that Malynes takes *no notice of inland bills*; hence we may presume that they were not in use in his time. He dates his preface to the *lex mercatoria*, on the 25th of Nov. 1622, and speaks of his book (p. 5,) as the fruit of 50 years experience. Marius (p. 2,) says, that " Mr. John Trenchant, in his book of arithme- " tick, printed at Lyons in Anno 1608, observes, that an exchange " made *in the same realm*, is not real." In the case of *Bromwich v. Loyd*, 2 *Lutw.* 1585, (*Hill.* 8. *W.* 3. *C. B.*) chief justice Treby said " that bills of exchange *at first* were extended only to *merchants strangers* trading with English merchants; and afterwards to *inland* bills between *merchants* trading one with another here in England; and after that to all *traders and dealers*, and of late to *all persons trading or not*." And in *Buller v. Crips*, 6 *Mod.* 29, (2 *Anne*,) lord chief justice Holt said, he remembered " when *actions* upon *inland* " bills of exchange first began."

Perhaps lord Holt might have been correct as to the time when *actions* upon inland bills first began, or rather when the first notice was taken of a difference between *inland* and *foreign* bills; but it appears probable that inland bills were in use much before lord Holt's remembrance. Marius first published his *advice* concerning bills of exchange in 1651, half a century before lord Holt sat in the case of *Buller v. Crips*, as appears by Marius's preface to his 2d edition; and he there says he has been 24 years a notary public, and in the practice of protesting " *inland* instruments and outland instruments." In p. 2, speaking of a bill between merchants in England, he says, it " is in " all things as effectual and binding as any bill of exchange made be- " yond seas and payable here in England, which we use to call an " *outland* bill, and the other an *inland* bill." If we go back 24 years from 1651, the time when Marius first published his advice, it will bring us to the year 1627; but if we go back 24 years from 1670, the probable date of his 2d edition, (which was probably his meaning) it will give us the year 1646, as the earliest date to which we can trace them. As Malynes in his *lex mercatoria*, of 1622, does not notice them, and as Marius mentions them as existing in 1646, it seems probable that they began to be in use between those two periods. Kyd, in his treatise on bills, p. 13, (Dublin edition, 1791,) speaking of *pro-*

miſſory notes, ſays, "the period of their introduction *appears* to have "been about 30 years before the reign of queen Anne;" but the only authority he cites is 6 *Mod.* 30, (2 *Anne*,) the caſe of *Buller v. Crips*, above mentioned, in which lord Holt ſays, he had conſulted two of the moſt famous merchants in London, who informed him that "it "was very frequent with them to make ſuch notes, and that they "looked upon them as *bills of exchange*, and that they *had been uſed* "*for a matter of* 30 *years*." This expreſſion, it will be obſerved, does not reſtrict the period to that limit, and it is probable that 30 years was a looſe expreſſion, and as far back perhaps as thoſe merchants could carry their recollection of any mercantile tranſaction. It is certain that promiſſory notes were in uſe upon the continent in thoſe commercial cities and towns with which England carried on the greateſt trade, long before that period; and were negotiable under the cuſtom of merchants in the countries from whence England adopted the greater part of her commercial law. They were called *bills obligatory*, or *bills of debt*, and are deſcribed with great accuracy by Malynes in his *lex mercatoria*, *p.* 71, 72, &c. where he gives the form of ſuch a bill, which is copied by *Molloy* in *p.* 447, (7th edition London, 1722,) and will be found in ſubſtance exactly like a modern promiſſory note. "I, A. B. merchant of Amſterdam, do by theſe "preſents, acknowledge to be indebted to the honeſt C. D. Engliſh "merchant, dwelling at Middleborough, in the ſum of £. 500, cur-"rent money, for merchandiſe, which is for commodities received of "him to my content; which ſum of £. 500, as aforeſaid, *I do hereby* "*promiſe to pay unto the ſaid C. D. (or the bringer hereof)* within ſix "months after the date of theſe preſents. In witneſs whereof, I "have *ſubſcribed* the ſame at Amſterdam, this day of July, "."

This is nothing more than a verboſe promiſſory note, which ſtripped of its redundancies is ſimply this—For value received, I promiſe to pay to C. D. or bearer, £. 500, in ſix months after date.

In p. 72, ſpeaking of theſe bills obligatory, he ſays, "The ſince-"rity of plain dealing hath been hitherto inviolable in the making of "the ſaid bills, which every man of credit and reputation giveth of "his *own hand writing*, or made by his ſervant, and ſubſcribed by "him, *without any ſeal or witneſs* thereto; and is made payable to "ſuch a merchant or *perſon*, or to *the bearer* of the bill, at ſuch times "of payment as is agreed."

As Malynes ſays nothing of inland bills, and yet is ſo very particular reſpecting promiſſory notes, the probability is that the antiquity

of the latter is greater than that of the former, and that they were more certainly within the cuſtom of merchants. Indeed there is a caſe prior to any in the books upon inland bills, which is believed to have been brought upon ſuch a promiſſory note, or bill obligatory, as is deſcribed by Malynes. It is in *Godbolt* 49, *(Mich.* 28. 29. *Eliz.* " *Anno* 1586,) " An action of *debt* was brought upon a *conceſſit ſol-* " *vere, according to the law merchant*, and the cuſtom of the city of " Briſtow, and an exception was taken, becauſe the plaintiff did not " make mention in the declaration of the cuſtom; but becauſe in " the end of his plea he ſaid " *proteſtando, ſe ſequi querelam ſecundum* " *conſuetudinem civitatis Briſtow*," the ſame was awarded to be good; " and the exception diſallowed."

Lord Ch. Baron Comyns in his digeſt, Tit. *merchant*, F. 1. F. 2. in abridging the ſubſtance of what Malynes had ſaid upon this ſubject of bills of debt, or bills obligatory, does not heſitate to ſtate the law to be that " payment by a merchant ſhall be made in money or by bill. " Payment by bill is by *bill of debt*, bill of credit, or bill of exchange. " A bill of debt, or bill obligatory is, when a merchant by his *writing* " acknowledges himſelf in debt to another in ſuch a ſum, to be paid at " ſuch a day, and *ſubſcribes* it at a day and place certain. *Sometimes* a " ſeal is put to it. But *ſuch* bill binds *by the cuſtom of merchants, with-* " *out ſeal, witneſs* or *delivery*. So it may be made payable to *bearer*, " and upon *demand*. So it is ſufficient if it be made and ſubſcribed " by the merchant's *ſervant*. So a bill of debt may be *aſſigned* to ano- " ther *toties quoties*. *And* now by the ſtat. 3 and 4 Anne, 9 all notes in " writing made and ſigned by any perſon, or the ſervant or agent," &c. (reciting the terms of the ſtatute.) By thus arranging his quotations from Malynes under the ſame head with the ſtatute of Anne reſpecting promiſſory notes, it is to be inferred that he conſidered the cuſtom of merchants reſpecting bills of debt, as ſtated by Malynes, to be the cauſe or origin of the ſtatute reſpecting promiſſory notes; and by connecting the former with the latter by the conjunction " *and*," it ſeems to be ſtrongly implied, that he conſidered *the ſtatute only as a confirmation of what was law before*. That he was correct in this opinion, and that the foreign cuſtom of merchants reſpecting promiſſory notes mentioned by Malynes was gradually and imperceptibly engrafted into the Engliſh law merchant at the *ſame time*, and under the ſame ſanction with *inland* bills, and that that cuſtom was acknowledged repeatedly by ſolemn legal adjudications in the Engliſh courts before the ſtatute of Anne, will probably be admitted when the authorities are examined which will be preſented in the following pages. A greater degree of weight will be attached to the opinion of Comyns, when it is recollected that he was either at the bar or on the bench during the reigns of

K. W. 3, Queen Anne, Geo. 1, and Geo. 2, and muſt therefore have known how the law ſtood before the ſtatute, what motives produced it, and what was the true intent of the parliament in paſſing it.

Anderſon, in his *hiſtory of commerce*, relates a number of facts which may throw ſome light upon this ſubject.

In vol. 1, *p.* 171, ſpeaking of the great antiquity of bills of exchange, he mentions a charter granted by the emperor Barbaroſſa to the city of Hamburgh *anno* 1189, in which one of their rights is "*to negotiate money* "*by exchange.*" He obſerves alſo, that bills of exchange were very new at this time in Europe, and were then in uſe only in the moſt conſiderable commercial cities. In *p.* 204 he ſays, that re-exchange, by way of damages, was firſt invented by the Ghibelines, when driven out of Italy by the Guelphs; and in *p.* 274, bills of exchange were known in England *anno* 1307, about the laſt year of the reign of Ed. 1, and are alluded to in the ſtatutes of 5th *R.* 2, *c.* 3, *anno* 1381, and 14 *R.* 2, *c.* 2, *anno* 1390. They are alſo mentioned *anno* 1406 and are called *literæ Cambii.* Hence it appears that for a period of nearly 350 years the cuſtom of merchants reſpecting bills of exchange was conſidered as confined to foreign bills, and it is now upwards of 150 years ſince it has been allowed to extend to inland bills.

The time when inland bills and promiſſory notes began to be in general uſe in England was probably about the year 1645 or 1646; and their general uſe at that time may be accounted for by the facts ſtated in *Anderſon's hiſt. of commerce, vol.* 1. *p.* 386, 402, 484, 492, 493, 519 *and* 520.

In the year 1638 or 1640, King Charles *forceably borrowed* £. 200,000 of the merchants of London, "who had lodged their money in the "King's mint in the tower, which place, before banking with gold-"ſmiths came into uſe in London, was made a kind of bank, or repoſi-"tory for merchants therein ſafely to lodge their money; but which, "after this compulſory loan, was never truſted in that way any more."

"Afterwards they generally truſted their caſh with their ſervants, "until the civil war broke out, when it was very cuſtomary for their "apprentices and clerks to leave their maſters, and go into the army. "Whereupon the merchants began, *about the year* 1645, to lodge their "caſh in goldſmiths' hands, both to receive and pay for them; until "which time the whole and proper buſineſs of London goldſmiths "was to buy and ſell plate and foreign coins of gold and ſilver," &c.

"This account," says Anderson, "we have from *a scarce and most* "*curious small pamphlet*, printed in 1676, entitled "*The mystery of the* "*new-fashioned goldsmiths, or bankers, discovered, in eight quarto pages,*" from which he extracts the following passage. "Such merchants' ser- "vants as still kept their master's running cash, had fallen into a way "of clandestinely lending it to the goldsmiths at 4 *pence per cent. per* "*diem*; who by these and such like means, were enabled to lend out "great quantities of cash to necessitous merchants and others, weekly "or monthly at high interest; and also began to discount the mer- "chants' bills at the like or an higher rate of interest. That much "about this time, they (the goldsmiths or new fashioned bankers) be- "gan to receive the rents of gentlemen's estates remitted to town, and "to allow them and others, who put cash into their hands, some in- "terest for it, if it remained a single month in their hands, or even "a lesser time. This was a great allurement for people to put their "money into their hands, which would bear interest till the day they "wanted it; and they could also draw it out by £. 100, or £. 50, &c. "at a time, as they wanted it, with infinitely less trouble than if they "had lent it out on either real or personal security. The consequence "was that it quickly brought a great quantity of cash into their hands; "so that the chief or greater part of them were now enabled to supply "*Cromwell* with money in advance on the revenues, as his occasions "required, upon great advantage to themselves.

"After the restoration, King Charles being in want of money, they "took ten per cent. of him *barefacedly*; and by private contract on ma- "ny bills, orders, tallies and debts of that king, they got 20, some- "times 30 per cent. to the great dishonor of the government. This "great gain induced the goldsmiths to become more and more lenders "to the king; to anticipate all the revenue; to take every grant of "parliament into pawn, as soon as it was given; also to outvie each "other in buying and taking to pawn, bills, orders and tallies; so that "in effect all the revenue passed through their hands. And so they "went on till the fatal shutting of the exchequer, in the year 1672."

The banking trade was at its greatest height in 1667, when the Dutch burnt some ships at Chatham. But that disaster causing a run on the bankers, it in some measure lessened their future credit, which was entirely ruined by the shutting up of the exchequer, five years after; by which they were prevented from drawing out the money weeekly, as it came in, so as to answer the demands upon them. The consequence was their failure for nearly a million and an half sterling, which sum they were in advance to the king; and the ruin or injury of 10,000 families.

This ſhort hiſtory of the goldſmiths will account for the ſudden increaſe of paper credit after the year 1645, and renders it extremely probable that inland bills and promiſſory notes were in very general uſe and circulation. Indeed, we know that to be the fact from the caſes in the books; upon examining which we ſhall find that there was *no diſtinction* made between inland bills of exchange, and promiſſory notes; they were both called *bills*; they were both called notes; ſometimes they were called "bills or notes." Neither the word "*inland*" nor the word "*promiſſory*" was at this time in uſe, as applied to diſtinguiſh the one ſpecies of paper from the other. The term "promiſſory note" does not ſeem to have obtained a general uſe till after the ſtatute. There was no diſtinction made, either by the bench, by the bar, or by merchants, between a promiſſory note and an inland bill, and this is the cauſe of that obſcurity in the reports of mercantile caſes during the reigns of Charles 2d, James 2d, and K. William, of which Lord Mansfield complained ſo much in the caſe of *Grant and Vaughan*, 3 *Bur.* 1525, *and* 1 *W. Bl.* 488; where he ſays, that in all the caſes in K. William's time, "there is great con-"fuſion; for, without ſearching the record, one can not tell whether "they aroſe upon promiſſory notes, or inland bills of exchange;" "for the reporters do not expreſs themſelves with ſufficient preciſion, "but uſe the words "*note*" and "*bill*" promiſcuouſly." This want of preciſion is apparent enough to us who now (ſince the deciſion of Lord Holt in the caſe of *Clerk v. Martin,*) read the caſes decided by him before that time; but at the time of reporting them there was no want of preciſion in the reporter, for there was not in fact, and never had been ſuggeſted, a difference in law between a promiſſory note and an inland bill. They both came into uſe at the ſame time, were of equal benefit to commerce, depended upon the ſame principles, and were ſupported by the ſame law.

IV. The caſe of *Edgar and Chut*, or *Chat and Edgar*, reported in 1*ſt. Keb.* 592, 636. *Mich.* 15. *Car.* 2. *Anno* 1663, ſeems to be the firſt in the books which appears clearly to be upon an *inland* bill of exchange. Without doubt many had preceded it, and paſſed *ſub ſilentio*. The caſe was this: A butcher had bought cattle of a grazier, but not having the money to pay for them, and knowing that the *parſon* of the pariſh had money in London, he obtained (by promiſing to pay for it) the parſon's order or bill on his correſpondent, a merchant in London, in favour of the grazier. The parſon having doubts of the credit of the butcher, wrote ſecretly to his correſpondent not to pay the money to the grazier until the butcher had paid the parſon. In conſequence of which, the London merchant did not pay the draft, and the grazier brought his ſuit againſt the parſon and declared on the

cuſtom of merchants. It was moved in arreſt of judgment that neither the drawer nor payee was a merchant. But it was held to be ſufficient that the drawee was a merchant.

Next came the caſe of *Woodward v. Row*, *Mich.* 18. *Car.* 2. *Anno* 1666. 2 *Keb.* 105. 132, in which the court ſaid that "the "*law of merchants* is the *law of the land*, and the cuſtom is good "enough generally for *any* man, *without naming him merchant*; and "they *will intend* that *he of whom the value is ſaid to be received by the* "*defendant was the plaintiff's ſervant.*"

The next is *Milton's caſe*, *Mich.* 20. *Car.* 2. *Hard.* 485, of which it may be neceſſary to take notice, as it has been conſidered as a leading caſe, and as having eſtabliſhed ſome principles upon which a number of ſubſequent caſes have been decided. It was an action of *debt* in the exchequer upon a bill of exchange accepted. The plaintiff declared that by the *cuſtom of England*, if a merchant ſend a bill of exchange to another merchant to pay money to another perſon, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the ſum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted; *per quod actio accrevit.* Upon *nil debet* pleaded, the verdict was for the plaintiff. A motion was made in arreſt of judgment, and one of the reaſons aſſigned was that there was "no *privity* between the plaintiff and defendant," "nor any contract in deed, or in law."

The chief Baron, among other things, ſaid that "without doubt if "the common law, or the cuſtom of the place, create a duty, *debt* "lies for it; as in the caſe of a toll due by cuſtom; 20. *H.* 7. 1. and "ſo in caſes of a certain ſum due by cuſtom for *pound breach* to the "lord of the manor, or to a goaler for *bar fees*, 21. *H.* 7. But the "great queſtion here is, whether or no a debt or duty be hereby raiſed: "For if it be no more than a *collateral* engagement, order or promiſe, "*debt lies not*, as in the caſe that has been cited, of goods delivered "by A. to B. at the requeſt of C. which C. promiſeth to pay for if "the other does not; for in that caſe a debt or duty does not ariſe be-"twixt A. and C. but a *collateral* obligation only. In our caſe the "acceptance of the bill amounts clearly to a promiſe to pay the mo-"ney; but it may be a queſtion whether it amounts to a *debt* or not."

Precedents were ordered to be ſearched; but none being found, the court afterwards, in *Hillary term*, 20, 21, *C.* 2, declared their opinions, "that an action of debt would not lie upon a bill of exchange

" accepted, againſt the acceptor; but that a ſpecial action upon the " caſe muſt be brought againſt him. *For the acceptance does not create* " *a duty*, no more than a promiſe made by a ſtranger, to pay, &c. if " the creditor will forbear his debt. And he that drew the bill con- " tinues debtor, notwithſtanding the acceptance, which makes the " acceptor liable to pay it. And this courſe of accepting bills being " a general cuſtom among all *traders* both within and without the " realm, and having every where that effect as to make the acceptor " liable to pay the contents, the court muſt take notice of that cuſtom; " but the cuſtom does not extend ſo far as to create a debt; it only " makes the acceptor *onerabilis* to pay the money. Though cuſtom " may give an action of debt, as in the caſe of toll; and ſo in caſe of " a fine for a copyhold.

" *Wherefore*, and becauſe no precedent could be produced, that an " action of debt had been brought upon an *accepted bill of exchange*, " judgment was arreſted."

The ground of this judgment ſeems to be that the *drawer* is the original debtor, and that the undertaking of the acceptor is only to pay the drawer's debt; and therefore is a *collateral* and not an original engagement. If the court were miſtaken in this poſition, the caſe is not law; or at leaſt the reaſon of the caſe fails. It may be true that the drawer is the original debtor until the bill is accepted; but after the bill is accepted the acceptor is the original debtor, and the undertaking of the drawer is collateral, viz. to pay, in caſe the acceptor does not. The queſtion in the caſe of *Heylin and Adamſon*, 2 *Bur.* 674, was, who was the *original debtor* in a bill of exchange. *Lord Mansfield* ſaid, " a bill of exchange is an order or command to the drawee, who has, " or is ſuppoſed to have, effects of the drawer in his hands, to pay. " When the drawee has accepted, *he* is the *original debtor*." If ſo, a *duty* is certainly created by the acceptance, and according to the ch. Baron's own admiſſion " *debt lies for it*." In the ſame caſe of *Heylin v. Adamſon*, lord Mansfield ſtates the law to be the ſame reſpecting the *maker* of a promiſſory note, as the *acceptor* of a bill of exchange; yet it has been held in the caſes of *Rumbald v. Ball*, 10 *Mod.* 38, *Rudder and Price*, 1 *H. Bl.* 547 and *Biſhop v. Young*. 2 *Bos and Pul.* 78, that *debt* lies againſt the maker of a promiſſory note. See alſo *Chitty on bills*, 220, where the authority of the caſe in Hardres 485, is doubted.

The next caſe is that of *Brown and London*, *reported in* 1 *Vent.* 152, 1 *Lev.* 298, 1 *Mod.* 285 *and* 2 *Keb.* 695, 713, 726, 758, 822, (*Mich.* 22. *Car.* 2. *anno* 1670) in which it was decided, upon the authority of *Milton's caſe*, *Hard.* 485, that *indebitatus aſſumpſit* would not lie *upon*

the acceptance of a bill of exchange. This case was not decided on the ground of *want of privity*, because it is said by the court, that "if A. "delivers money to B. to pay to C. and gives C. a bill of exchange "drawn on B. and B. accepts the bill, and doth not pay it, C. may "bring an *indebitatus assumpsit* against B. *as having received money to his* "*use*: but then he must not declare only on a *bill of exchange accepted*, as "the case at bar is." And in the case of *Rables v. Sikes*, at the same term, 2 *Keb.* 711. Such a declaration of *indebitatus assumpsit* for money had and received in case of a bill of exchange, was adjudged good upon demurrer.

The case of *Baker v. Hill* (*Pasch.* 28, *Car.* 2) 3 *Keb.* 627 is the next which occurs in the books. This is said by the reporter to be "*Debt* "on *inland bill* by custom of merchants." This appears to be the first case in which the term "*inland bill*" is used, but it furnishes no evidence that the case was not upon a promissory note; for it will be observed by any one who will take the trouble to examine the cases prior to the judgment in the case of *Clerk v. Martin* (1 *Anne.*) that the term *promissory note* was not in use, nor had they any technical name by which to distinguish a promissory note from an inland bill of exchange, unless it was by calling the former an inland bill, and the latter an inland bill of *exchange.* In the case of Baker and Hill, the circumstance of its being an action of *debt*, induces a suspicion that it was a promissory note, because we have already seen that in the case of a bill of exchange, it had been decided in *Hard.* 485, that an action of debt would not lie.

In the next case, which is "*against Elborough*," *Pasch.* 28, *Car.* 2, 3 *Keb.* 765, it seems doubtful whether it was a promissory note, or an inland bill of exchange. It is a short note of a case in these words, "In action upon the case on custom of London, that any merchant or "other inhabitant there *subscribing a note for payment of money to any other*, "not said where inhabiting; on default of payment by him *on whom* "*the bill is drawn*, should pay, &c. *Thompson* excepted in arrest of "judgment, that no action lieth as between merchants it doth; *sed* "*non allocatur*, for *per curiam* there is as much reason for *inland bills as* "*for bills of exchange*, and this is no more, and being averred that the "defendant is an inhabitant in L. &c. judgment for the plaintiff."

The case of *Shelden v. Hentley*, 2 *Show.* 161, (33, *Car.* 2, *B. R. anno* 1680) was "upon a note *under seal*, whereby the defendant promised "to pay to the *bearer* thereof, *upon delivery of the note*, £. 100, and "avers that it was delivered to him, (meaning the defendant) by the "*bearer* thereof, and that he (the plaintiff) was so."

It was objected that this was no deed becauſe there was no perſon named in the deed to take by it. But it was anſwered that it was not a deed until delivered, and then it was a deed to the plaintiff.

" Court. The perſon ſeems ſufficiently deſcribed at the time that 'tis " made a deed, which is at its delivery: and ſuppoſe a bond were " now made to the lord Mayor of London, and the party ſeals it, and " after this man's mayoralty is out, he delivers the bond to the ſubſe- " quent mayor, this is good; *et traditio facit chartam loqui.* And by " the delivery he expounds the perſon before meant; *as when a mer-* " *chant promiſes to pay to the bearer of the note, any one that brings the note* " *ſhall be paid.* But Mr. juſtice Jones ſaid *it was the cuſtom of merchants* " *that made that good.*" Here it will be obſerved that the court, in order to elucidate the ſubject before them, refer to principles of law more certain and better known, viz. that a promiſſory note payable to bearer is good, and that promiſſory notes were within the cuſtom of merchants.

Then followed the caſe of *Norfolk v. Howard, Trin.* 34, *Car.* 2, *B. R. anno* 1681, 2 *Show.* 235, which was " caſe upon *ſpecial* promiſe " on *a note* wherein the defendant *promiſed to pay unto the plaintiff* £. 50 " at any time during the joint lives of plaintiff and defendant, within " 3 months after the plaintiff ſhould demand the ſame; and no de- " mand *modo et forma* pleaded." The demand proved was by plaintiff's attorney who delivered a demand in writing at the defendant's houſe to his maid, by whom it was ſent up to the defendant, being ſick and not to be ſpoken with; the maid brought down word ſhe had delivered it to her maſter;—held no good evidence to maintain the action, for the demand ought to be perſonal. No objection was made to the form of the action; it was only to the ſufficiency of the demand.

The next caſe is *Hintons (Mich.* 34. *Car.* 2. *Anno* 1681.) 2 *Show.* 235, which is ſaid to be, " Caſe on a *bill of exchange* againſt the " *drawer, Bill not being paid,* and payable to I. S. or to the *bearer*; " the plaintiff brings the action as *bearer*; and upon evidence ruled by " the lord Pemberton, that he muſt intitle himſelf to it on a valuable " conſideration, though among bankers they never make *indorſements* " in ſuch caſe; for if he come to be bearer by *caſualty or knavery,* " he ſhall not have the benefit of it." It does not appear that this is not an action on a promiſſory note. It ſeems to have been either a banker's promiſſory note or a check drawn on a banker, and at this time no difference was ſuppoſed to exiſt as to the law in thoſe caſes. But it expreſſes a clear opinion that the *bearer* of ſuch a note or bill

may maintain an action in his own name, if he came *fairly* by the bill. And although this principle was denied in the ſubſequent caſes of *Horton and Coggs*, *Hodges and Steward*; *and Nicholſon and Sedgwick*. yet theſe again were expreſsly over ruled and denied to be law by lord Mansfield and the reſt of the judges in the caſe of *Grant v. Vaughan*, 3. *Bur.* 1516; in which caſe the reaſoning of the court applies as ſtrongly to the caſe of a promiſſory note as to that of an inland bill of exchange.

In the caſe of *Claxton v. Swift in the exchequer on a writ of error*, (*Hill* 36, 37. *Car.* 2. *Anno* 1684.) 1. *Lut.* 878, it was decided, upon an inland bill, "that the firſt drawer of the bill and every indor-"ſer is liable to the payment of a ſum certain, to the laſt indorſee." No difference was then taken between an inland bill and a promiſſory note. Both were conſidered as being within the cuſtom. So that what is ſtated to be law as to one may be conſidered to be law as to the other.

In the caſes of *Cramlington and Evans* (*T.* 3. *Jac.* 2.) 2. *Vent.* 296. and *Ewers v. Benebkin* (*M.* 4. *Jac.* 2.) 1. *Lut.* 231, the pleadings are ſet forth at large, and ſhew the manner of declaring upon the cuſtom as to inland bills.

The caſe of *Darrach v. Savage* (*Paſch.* 2. *W. and M. Anno* 1689) 1. *Show.* 155, was "*indebitatus aſſumpſit* for £. 40 received to the "plaintiff's uſe. *Non aſſumpſit* pleaded; and upon the trial, the evi-"dence was a *bill of exchange or note* under the defendant's hand, da-"ted the 22d February 1687, directed to a merchant in London, pray "pay to Mr. Darrach or his order the ſum of £. 40 and place it to "my account, value received, witneſs my hand."

This caſe ſhews that a bill or note was good evidence on an action for money had and received; and that no diſtinction was made between a *bill* and a *note*.

Horton v. Coggs. (*Mich.* 2. *W. and M. C. B. Anno* 1689) 3. *Lev.* 299, was clearly upon a promiſſory note, yet in the margin it is called "*aſſumpſit ſur bill de exchange.*" The plaintiff "declared upon "a cuſtom in London, that if any merchant or other perſon, merchan-"dizing in London, make a note in writing under his hand *and there-*"*by promiſe to pay any ſum of money therein contained, to a perſon therein-*"*named* or *bearer*; and if the perſon in the note named, to whom by "the note it was promiſed to be paid, *aſſign* or *deliver* it to any other "perſon to receive it to his own uſe, and he bring it to the drawer

" of the note and requeſt him to pay it to him who brings the note, " then the perſon who made the note was chargeable to pay it to the " bearer. And that the defendant being a goldſmith, made ſuch a " note, thereby promiſing to pay £. 100 to William Barlow, or the " bearer; and that Barlow delivered the note to the plaintiff, to re- " ceive the money to his own uſe, in ſatisfaction of £. 100, due to " him by Barlow; and that the plaintiff brought and ſhowed this to " the defendant, and requeſted him to pay the £. 100, which he had " not done, whereby, by the cuſtom, he became chargeable, and ſo " being chargeable aſſumed to pay. After verdict for the plaintiff, it " was moved in arreſt, &c. that this cuſtom to pay to *bearer* was *too* " *general*; for perhaps the goldſmith, before notice by the bearer, had " paid this to Barlow himſelf. (And this was at bar now alleged to " be the truth of the caſe.) And of ſuch opinion, after divers mo- " tions in Hillary term, and this term, were Pollexfen, Powell and " Rookſby. Ventris being dead in the laſt vacation. Although upon " the trial of the cauſe before Pollexfen at Guild-hall, he then held " that the action well lay, this matter being objected at the trial. Le- " vins of counſel for the plaintiff."

In this caſe the only objection was that a cuſtom to pay to *bearer* was too general. It ſeems to be admitted that *Barlow* himſelf might have brought an action upon the cuſtom; and that a cuſtom to pay to *order* or to *indorſee* would have been good. It is a ſufficient anſwer to this caſe, that in the caſe of *Grant v. Vaughan*, 3 *Bur.* 1516, it was declared not to have been law, ſo far as it decided that an action could not be maintained by the *bearer* of ſuch a note in his own name.

The caſe of *Dehers v. Harriot*, *(T. 2. W. and M.)* 1 *Show.* 163, was this—" A. draws a firſt and ſecond bill of exchange payable by " himſelf in Dublin, to B. or order," who indorſed to the plaintiff. No queſtion was made as to this being a bill of exchange; and yet it differs in nothing but in form from a promiſſory note.

The next caſe is *Hodges v. Steward*, *(Paſch. 5. W. and M.)* reported in *Comb.* 204. 1 *Salk.* 125. 12 *Mod.* 36, and *Holt* 115. The caſe is thus ſhortly ſtated by Comberbach. "Caſe upon *a bill of exchange*: " Cuſtom was laid in London, that where a *bill* is payable to A. or " *bearer*, it muſt be paid to the *indorſee*. Holt, chief juſtice, ſaid it " was *repugnant*; for another perſon, and not the indorſee, might " be the bearer." This ſeems to be the true ground of the deciſion, although the reaſons are variouſly ſtated by the different reporters. They all call it a bill of exchange, but in 12 *Mod.* 36. we are informed what kind of a bill of exchange it was, viz. A bill drawn by the

defendant *on himself*, payable to another or *bearer*. The payee *indorsed it*, and the *indorsee as such*, and not as bearer, brought the action, which was held not to lie; because no authority was given to the payee to *indorse*, or to transfer it *by indorsement*. And in 1 *Salk.* 125, it appears that in the same case a difference was taken between a *bill* payable to *bearer*, and to *order*; for a bill payable to "I. S. *or bearer* "is not *assignable by the contract* so as to enable the *indorsee* to bring "an action; because there is no such authority given to the party by "the *first contract*." "But when the *bill* is payable to I. S. or *order*, "there an *express power* is given to the party to *assign*, *and the indorsee* "*may maintain an action*."

It was also said that although such an indorsement is not a good assignment of the bill so as to charge the drawer; yet it is a good *bill* between the indorser and indorsee; and the indorser is liable to an action for the money, "*for the indorsement is in nature of a new* "*bill*." It was also held, (as it had been before adjudged in *Milton's* case, *Hard.* 485, and in *Brown and London's case*, 1 *Vent.* 152,) that a general *indebitatus assumpsit* would not lie *on* a bill of exchange, but that the action must be either a general *indebitatus assumpsit for money had and received*, or a special action upon the case grounded on the custom. Upon this case it may be remarked that a bill drawn by a man *on himself*, is precisely a promissory note in effect; and Lovelass in his treatise on bills and notes, p. 22, expressly says, "that the "law considers a promissory note in the light of a bill drawn by a "man upon himself, and accepted at the time of drawing." *Marius* also in his *advice*, *p.* 3, says, "a bill may be by *two* persons, as where "the drawer makes the bill payable to himself or order," so where a man draws a bill *on* himself. The same is said by *Kyd*, *on bills*, *p.* 2, and *Chitty*, 22, 48, says, "a bill will be valid where there is only "one party to it, *for a man may draw on himself*, *payable to his own* "*order*; but in such case it is said that the instrument is more in the "nature of a *promissory note*, than a bill of exchange."

The next case is that of *Hill et al. v. Lewis*, (*H. 5. W. and M. B. R.*) 1 *Salk.* 132. This was an action by the holder against the indorser of two notes *subscribed* by one Moore, a goldsmith, payable to the defendant and by him indorsed in blank, and delivered to one Zouch, to whom he was indebted. Zouch delivered them so indorsed to the plaintiffs, and received from the plaintiffs therefor other bills and some cash. One of the notes was payable to the defendant *or order*, the other was payable to the defendant without the words "*or order*." Moore broke and ran away; the plaintiff declared, 1st, upon *two bills of exchange* against the indorser; 2dly, upon a mutuatus; 3dly, upon

an *indebitatus assumpsit* for money laid out for the use of the defendant. And the principal question was, whether the plaintiffs had used due diligence in applying to Moore for the money. *Holt, chief justice,* held "*That goldsmiths' bills were governed by the same laws and customs as other* "*bills of exchange; and every indorsement is a new bill:* And so long as "a bill is in agitation, (circulation) and such indorsements are made, "*all the indorsers and every of them are liable as a new drawer.* That "*by the law generally, every indorser is liable as the first drawer,* and can "not be discharged without an actual payment; and is not discharged "by the acceptance (receipt) of the bill by the indorsee; but by the "custom this is restrained, viz. the acceptance (receipt) is intended to "be upon this agreement, sc. that the indorsee will receive it of the "*first drawer* if he can, and if he can not, then that the indorser "will answer it; as if the first drawer be insolvent at the time of the "indorsement, or upon demand refuses to pay it, or cannot be found. "And the indorser is not discharged without actual payment, until "there be some neglect or default in the indorsee, as if he does not "endeavour to receive it in convenient time, and then the first "drawer becomes insolvent." "He left it to the jury to consider, "whether the time in this case were convenient time or not; and if "the plaintiff had convenient time to receive his money, then to find "for the defendant, otherwise for the plaintiff. And they upon con-"sideration found for the plaintiff; upon which the plaintiff prayed to "take the verdict upon the *indebitatus assumpsit. Et per chief justice,* "You can not take the verdict upon any part of the declaration but "that to which evidence was given, *and here it will be good if found upon* "*the bills of exchange;* but if the evidence be applicable to any other part "of the declaration, you make take it upon any such part to which the "evidence is applicable. And becaus Zouch had sworn that he re-"ceived the benefit of, and had been satisfied with the bill he took of "the plaintiff, by which the defendant was discharged against Zouch, "the verdict was taken upon the *indebitatus assumpsit* for money laid "out for the defendant's use; and it seemeth the indorsement by the "defendant to the plaintiff was good evidence of a request to pay the "said money to Zouch. Now, exception was taken that one bill was "payable to the defendant only, without the words "*or his order,*" "and therefore not assignable by the indorsement; and the chief jus-"tice did agree that the indorsement of this bill did not make him that "drew the bill chargeable to the indorsee; for the words "*or to his* "*order, give authority to the plaintiff to assign it by indorsement; and 'tis* "*an agreement by the first drawer that he would answer it to the assignee;* "but the indorsement of the bill which has not the words "*or to his* "*order*" is good, or of the same effect between the indorser and the "indorsee, *to make the indorser chargeable to the indorsee.*" This case

certainly ought to have been considered as settling the law upon promissory notes. Lord Holt here admits that promissory notes are "*governed by the same laws and customs as other bills of exchange;*" and that if the verdict had been taken upon the count which declared *upon the notes as bills of exchange* it would have been good. His reasons why a note to order is assignable, viz. "that the words, *or to his order, give authority to the plaintiff to assign it by indorsement; and that 'tis an agreement by the first drawer that he would answer it to the assignee,*" are certainly good; and are the same which were used in several modern cases which will be noticed hereafter. The observation is also important "*that the indorsement by the defendant to the plaintiff was good evidence of a request to pay the money to Touch.*" We shall have occasion to refer to this case again when we come to consider the cases of Clerk and Martin, and Buller and Crips, decided about nine years afterwards.

The case of *Pearson and Garret* occurred in the next term *anno* 1693, and is reported in *Comb.* 227. and 4. *Mod.* 242. "The action was "brought upon a note for the payment of sixty guineas when the defendant should marry such a person, &c. in which the plaintiff declared as upon a bill of exchange setting forth the custom of merchants," &c. This note appears by the declaration, which is stated at length 4 *Mod.* 242, to be dated 21st October, 4th W. and M. by which the defendant "*promised* to pay to the plaintiff *or his assigns* sixty guineas in two months after the defendant should be lawfully "married to one Elizabeth Pretty."

It was objected that this was "only an agreement founded upon a "*brokage*, and therefore not within the custom of merchants; neither were there ever yet any precedents to pay money upon such a "*collateral contingency.*" The judgment was for the defendant; and it was said that, "*If the note had been given by way of commerce it had "been good;* but to pay money *upon such a contingency* cannot be called "trading, and therefore not within the custom of merchants."

If any doubt could remain that the case of *Hill and Lewis* had fully settled the law that promissory notes were within the custom of merchants, that doubt must have been completely removed by the case of *Williams v. Williams*, decided at the next term in the same year in the king's bench (*viz. Pasch. 5. W. and M. Anno* 1692,) *Carthew* 269. "The plaintiff Thomas Williams being a goldsmith in Lombard street, "brought an action on the case against Joseph Williams, *the projector of the diving engine*, and declared upon a note drawn by one

" *John Pullin*, by which he promiſed to pay £. 12 10 0 to the ſaid " Joſeph Williams on a day certain; and *he* indorſed the note to one " Daniel Foe, who indorſed it to the plaintiff for like value received. " And now the plaintiff, as *ſecond* indorſee, declared in this manner, " viz. " that the city of London is an ancient city, and that there is, " and from the time to the contrary whereof the memory of man doth " not exiſt, there hath been a certain ancient and laudable cuſtom " among merchants and *other perſons* reſiding and exerciſing commerce " *within this realm of England*, uſed and approved, viz. &c. So ſets forth " the *cuſtom of merchants* concerning *notes* ſo drawn and indorſed *ut* " *ſupra*, by which the firſt indorſer is made liable as well as the ſecond, " upon failure of the drawer, and then ſets forth the fact thus, viz. " And whereas alſo, a certain John Pullin, who had commerce by " way of merchandizing, &c on ſuch a day, at London aforeſaid, to " wit, in the pariſh of St. Mary le Bow, in the ward of Cheape, ac- " cording to the uſage and cuſtom of merchants, made a certain *bill* " *or note* in writing, ſubſcribed with his name, bearing date, &c. " and by the *ſaid bill or note promiſed to pay*, &c. ſetting forth the note; " and further, that it was indorſed by the defendant to Foe, and by Foe " to the plaintiff, according to the uſage and cuſtom of merchants; and " that the drawer having notice thereof, refuſed to pay the money, " whereby the defendant, according to the uſage and cuſtom of mer- " chants, became liable to the plaintiff, and in conſideration thereof " promiſed to pay it, &c. alleging that they were all perſons who " traded by way of merchandize, &c.

" To this the defendant pleaded a frivolous plea, and the plaintiff " *demurred; and upon the firſt opening of the matter* had judgment in B. " R. And now the defendant brought a *writ of error in the exchequer* " *chamber*, and the only error inſiſted on was, that the plaintiff had not " declared on the cuſtom of merchants in *London*, or any other par- " ticular place, (as the uſual way is) but had declared on a cuſtom " *through all England*, and if ſo it is the *common law*, and then it ought " not to be ſet out by way of *cuſtom*; and *if it is a cuſtom*, then it ought " to be laid in ſome *particular place*, from whence a venue might ariſe " to try it.

" To which it was anſwered that *this* cuſtom of merchants con- " cerning bills of exchange *is part of the common law*, of which the " judges will take notice *ex officio*, as it was reſolved in the caſe of " *Carter v. Downiſh*, and therefore it is needleſs to ſet forth the cuſ- " tom ſpecially in the declaration, for it is ſufficient to ſay that ſuch " a perſon, *according to the uſage and cuſtom of merchants*, drew the bill; " therefore all the matter in the declaration concerning the ſpecial

" cuſtom was merely ſurpluſſage, and the declaration good without " it.

" *The judgment was affirmed.*"

There cannot be a ſtronger caſe than this. *On demurrer* judgment was rendered for the plaintiff in the *King's bench*, which judgment was *affirmed* upon argument, upon a writ of error in the exchequer chamber, on the very point of the cuſtom; ſo that here was the unanimous concurrence of *all the judges of England.* This caſe, it is believed, has never been denied to be law, either before or ſince the ſtatute of Anne.

A ſhort note of this caſe is to be found in 3 *Salk.* 68, by the name of *Williams v. Field*, in theſe words, " Ruled, that where a bill is " drawn payable to W. R. *or order*, and he indorſes it to B. who indor- " ſes it to C. and he indorſes it to D. the laſt indorſee may bring an ac- " tion againſt *any* of the indorſers, *becauſe every indorſement is a new* " *bill*, and implies a warranty by the indorſer that the money ſhall be " paid."

The next caſe upon a promiſſory note is that of *Bromwich v. Loyd*, (*Hill*, 8. *W.* 3, *C. B. anno* 1696) 2 *Lut.* 1582, where the pleadings are ſet forth at full length, in which the plaintiff declares that " at " London aforeſaid, viz. in the pariſh, &c. there is a cuſtom that if " any merchant or other perſon reſiding and trading at London, make " any note with his proper hand ſubſcribed, and thereby promiſe to " pay to any other perſon dwelling at London, any ſum in ſuch note " ſpecified, then ſuch perſon who ſubſcribed ſuch note, by reaſon " thereof, and by the ſaid cuſtom is liable to pay the money, &c. " That the defendant, 8th June 1696, reſiding and dealing at London, " made a note, &c. and thereby promiſed to pay to the plaintiff at " London aforeſaid in the pariſh and ward aforeſaid reſiding, £. 26. " 10. 9 on demand, by reaſon whereof, &c.

" To this the defendant pleaded that at the time of making the ſaid " note, he was reſident at *Brentford*, &c. *abſque hoc*, that he was reſi- " dent at London. To which plea the plaintiff demurred, for that the " defendant had traverſed *matter not traverſable*, and becauſe it tended " to the general iſſue," &c.

It was urged for the defendant, that the cuſtom was laid in St. Mary le Bow, but in fact is extended to London, and was therefore contradictory. *Sed non allocatur* " for *per curiam*, the pariſh is mentioned

" but in reſpect of the venue, and that it was matter of neceſſity to al-
" lege it ſo."

And it was further ſaid for the defendant, " that there were three
" things neceſſary to maintain the action, viz. 1. *commorancy*, 2. The
" making of the note, 3. Commerce between the parties; but there
" is no place mentioned in the declaration where the note was
" made; *ſed non allocatur*, for it ſhall be intended at the pariſh of *St.*
" *Mary le Bow*; for it is ſaid, that the *defendant at London aforeſaid in*
" *the pariſh and ward aforeſaid*, reſiding and uſing commerce, made a
" note; and therefore the whole is to be intended at the ſame place.

" It was alſo objected *that the cuſtom was unreaſonable, becauſe it took*
" *away the proof how the money became due*; but the court were of opi-
" nion *that the cuſtom was good notwithſtanding this objection.*

" *Treby, chief juſtice*, ſaid in this caſe, that bills of exchange at firſt
" were extended only to merchant *ſtrangers*, trading with Engliſh
" merchants, and afterwards to *inland* bills between merchants trading
" one with another here in England; and after that to all *traders and*
" *dealers*, and of late *to all perſons trading or not*; and that there was no
" occaſion to allege *any* cuſtom; and that was *not denied by any of the*
" *other juſtices.* And the chief juſtice alſo ſaid, that *bills of exchange*
" were of ſuch general uſe, and benefit, that on an *indebitatus aſſump-*
" *ſit*, a bill of exchange *may be given in evidence to maintain the action*;
" and *Powell, juſtice*, ſaid, that on a general *indebitatus aſſumpſit for*
" *money received to the uſe of the plaintiff*, ſuch bills may be left
" to the jury to determine whether it was for value received or not.
" In Hill, 9 and 10, W. 3 the plaintiff had judgment by the opinion
" of the whole court." This caſe is in perfect conformity to thoſe of Hill and Lewis, and Williams and Williams.

The caſe of *Pinckney v. Hall (Hill, 8 and 9, W. 3, anno 1697, B. R.)* 1 *lord Raymond*, 175, was by the *indorſee* of a promiſſory note made by the defendant for himſelf and partner as joint merchants to Hutchins or order, and by him indorſed to the plaintiff. The declaration was on the *cuſtom of England*, to which the defendant *demurred.*

1ſt. " Becauſe the declaration being *per conſuetudinem Angliæ*, &c.
" was ill, for the *cuſtom* of *England* is the *law of England*, of which
" the judges ought to take notice without pleading. *Sed non allocatur.*
" For though *heretofore* this has been allowed, yet of late time it has
" always been over-ruled, and in an action againſt a *carrier* it is always
" laid *per conſuetudinem Angliæ.* 2d. Though *lex mercatoria* is part of the

" law of England, yet it is but a *particular cuſtom among merchants*, and " therefore it ought to be ſhewn in London or ſome other particular " place. *Sed non allocatur; for the cuſtom is not reſtrained to any parti-* " *cular place.*" Two other exceptions were taken which are not material to the preſent queſtion: but *judgment was given for the plaintiff.*

At the next term (*Eaſter* 9, *W.* 3) 1 *Lord Raymond*, 180, occurred the caſe of *Nicholſon v. Sedgwick*, reported alſo in 3 *Salk.* 67, where it is ſtated to be upon a *bill.*

" The defendant Sedgwick, being a goldſmith, made a note in wri- " ting by which he *promiſed to pay* to one Maſon, or to the *bearer* " thereof £. 100. Maſon *delivered* the note to the plaintiff for £. 100 " in value received," who brought the action as bearer and declared upon the " cuſtom of merchants and others trading *within this realm.*"

Upon *non aſſumpſit* pleaded, and verdict for the plaintiff, " it was " moved in arreſt of judgment that this action could not be brought " in the name of the bearer, but it ought to be brought in the name " of him to whom it was made payable. *Quod fuit conceſſum per cu-* " *riam*; for the difference is, where the *note* is made payable to the " party or *bearer*, and where it is payable to the party or *order*; *in* " *the latter caſe the indorſee has been allowed to bring the action in his own* " *name.*" The principal point of this caſe, viz. that the *bearer* could not maintain an action in his own name, was expreſsly declared not to be law, in the caſe of *Grant v. Vaughan*, 3 *Bur.* 1516.

In the ſame year in the caſe of *Boulton v. Hilleſden*, *Comb.* 450, it was decided that a maſter may be bound by a promiſſory note made by his ſervant.

Another caſe in the ſame year is cited in 1 *Com. Dig.* 190, 191, by the name of *Cromwell v. Floyd*, *in C. B.* which does not ſeem to have been reported, unleſs it be the ſame caſe with that reported in 2 *Lut.* 1582, by the name of *Bromwich v. Loyd*; which is not impoſſible.

In *Mich. term* of the ſame year, in the caſe of *Woolvil v. Young*, *et al.* 5 *Mod.* 367, it was held that a declaration upon a promiſſory note, founded on the cuſtom of England, was bad, becauſe it did not allege that the defendants were *commercium habentes*; but it ſeems to admit that it would have been good if thoſe words had been uſed.

In an *anonymous caſe* in chancery, in the ſame year, reported by *Ch. Baron Comyns*, *p.* 43, it is ſaid that the " indorſee for a valuable

" conſideration recovered in *indebitatus aſſumpſit* on this bill of ex-
" change, againſt the *drawer*. The drawer filed a bill in chancery
" to be relieved againſt this judgment at law, alleging *that he received*
" *no value;* and that the indorſee might reſort to the indorſer for his
" original claim. It was anſwered that the drawer might be relieved
" againſt the *payee*, or any claiming as ſervant or factor of, or to the
" uſe of the payee: but the chancellor held that the indorſee being
" an honeſt creditor, and coming by this bill fairly, for the ſatiſ-
" faction of a juſt debt, he would not relieve againſt *him*, becauſe it
" would tend to deſtroy trade which is carried on every where by bills
" of exchange, and he would not leſſen an honeſt creditor's ſecurity."

It may be doubted whether this was really a bill of exchange or a promiſſory note; and perhaps it is immaterial which it was, as the law had been clearly ſettled to be the ſame upon both. Yet if it had been a bill of exchange it ſeems probable that ſomething would have been ſaid of the *drawee;* by which it ſhould appear that the plaintiff had a right of action againſt the *drawer;* ſuch as that the bill had been preſented for acceptance, and refuſed; or that being accepted by the drawee, he had refuſed to pay, &c.

The caſe of the *bank of England v. Newman*, 12 *Mod.* 241. *B. R.* 1 *lord Ray.* 442, *and Comyns rep.* 57, was upon a promiſſory note, drawn by one Bellamy, payable to Newman or *bearer*, who diſcounted it at the bank without indorſing it. Upon Bellamy's failure the bank brought ſuit againſt Newman. But the court held him not to be liable, " for the law is, that if a bill or *note* be payable to one or
" *bearer*, and he negotiates the bill and delivers it for ready money
" paid to him, without any indorſement on the bill, this is a plain
" buying of the bill; as of *tallies*, *bank-bills*, &c. *but if it be indorſed,*
" *there is a remedy againſt the indorſer.*"

Hawkins v. Cardy, in the next year, (*Mich.* 10. *W.* 3. *B. R.*) 1 *Lord Raym.* 360. 1 *Salk.* 65. *Carth.* 466, was alſo upon a promiſſory note. " The plaintiff brought an action on the caſe *upon a bill*
" *of exchange*," (ſays the reporter,) " againſt the defendant, and de-
" clared upon the cuſtom of merchants, which he ſhewed to be thus:
" that if any merchant *ſubſcribes a bill, by which he promiſes to pay* a ſum
" of money to another man *or his order*, and afterwards the perſon
" to whom the bill was made payable, indorſes the ſaid bill for the
" payment of the *whole* ſum therein contained, *or any part thereof*,
" to another man, the firſt drawer is obliged to *pay the ſum ſo indorſed*,
" to the perſon to whom it is indorſed payable; and then the plaintiff
" ſhews that the defendant, being a merchant, ſubſcribed a bill of

" £. 46 19 0 payable to Blackman *or order*; that Blackman indorſed " £. 43 4 0 of it, payable to the plaintiff," &c.

On *demurrer*, the declaration was adjudged ill; " for a man can " not apportion ſuch perſonal contract; for he cannot make a man " liable to two actions, where by the contract he is liable but to one." " *But if the plaintiff had acknowledged the receipt of the* £. 3 15 0 *the* " *declaration had been good.*"

And " *Holt, chief juſtice*, ſaid, that *this* is not a particular local cuſ- " tom, *but the common cuſtom of merchants, of which the law takes* " *notice.*"

Salkield in reporting this caſe, begins thus, " A. having *a bill of* " *exchange upon* B. indorſes part of it to I. S. who brings an action " for his part," &c. This, compared with lord Raymond's report of the caſe, ſhews what has been already ſo often mentioned, that no difference had yet been diſcovered between the law reſpecting promiſſory notes, and that concerning inland bills of exchange. Even lord Raymond ſtates it firſt to be a bill of exchange, and immediately ſhows it to have been a promiſſory note. So glaring a contradiction could not have paſſed uncorrected, if a promiſſory note and an inland bill of exchange had not been conſidered as the ſame thing.

In this caſe it will be remarked, that upon *demurrer*, the court ſaid that this declaration, *upon the cuſtom of merchants, on a promiſſory note, by the indorſee againſt the maker*, would have been good, if the receipt of the £. 3 15 0 had been acknowledged.

The next year produced the caſe of *Lambert v. Oakes* (*Paſch* 11. *W.* 3. *B. R.*) reported in 1. *lord Ray.* 443. 1. *Salk.* 127, by the name of *Lambert v. Pack.* 1 *Salk.* 126. *caſe* 6, *Anonymous.* 12 *Mod.* 244. *and Holt* 118. This caſe was clearly upon a promiſſory note, although four out of the five reports of the caſe call it *a bill of exchange.* This circumſtance ſhows that no difference was underſtood to exiſt at that time between a promiſſory note and an inland bill of exchange; for upon this ſuppoſition only can we account for the extreme inaccuracy of ſo many reporters upon that point. The fact of its being called a bill of exchange induces alſo a ſtrong preſumption of another fact which does not expreſsly appear in Lord Raymond's report of the caſe, and that is that the plaintiff grounded his action *on the cuſtom of merchants*; which was at that time the only known and eſtabliſhed form of declaring upon a promiſſory note. This was then an action by the *indorſee* againſt the *indorſer* of a promiſſory note, pay-

able to defendant *or order, grounded on the cuſtom of merchants*, in which it was decided that the plaintiff muſt demand the money of the *drawer* of the note, before he could reſort to the indorſer; and is another ſtrong caſe to ſhow that promiſſory notes and inland bills of exchange, before the ſtatute of Anne, were preciſely on the ſame footing.

The caſe of *Starke v. Cheeſman*, in the ſame year, Carth. 509. was upon a bill of exchange drawn by the defendant in *Virginia upon himſelf* in London, which, as has been before obſerved, is in effect a promiſſory note. The plaintiff had judgment, although he had not alleged in the declaration that the defendant promiſed to pay the money after proteſt, or even that he had notice of the proteſt, for "*the* "*law did raiſe the promiſe upon the cuſtom of merchants* and therefore it "was not neceſſary to lay an actual promiſe."

In the next year, (*Paſch.* 12. *W.* 3. *Anno* 1700, *B. R.*) we find the caſe of *Carter v. Palmer*, reported in 12. *Mod.* 380.

"Palmer had given a *note* under his hand in this form: "*I promiſe* "*to pay the* BEARER *ſo much money on demand.*"

"Plaintiff brings his action grounding it upon the cuſtom of mer- "chants, as if it were a bill of exchange; *and avers no conſideration.* "After verdict, upon motion in arreſt of judgment, *Holt, chief juſ-* "*tice*, "We will take ſuch a note *prima facie* for evidence of money "lent; and though they have declared on the cuſtom, yet we muſt take "care that by ſuch a drift, the law of England be not changed, by "making *all* notes bills of exchange." "But *all* ſeemed to agree if it "were made payable to him *or order*, the *defendant by that form had* "*made it negotiable, and by conſequence he would be liable to the action of* "*aſſignee in his own name*; for if a man who is no merchant *will* "*draw a bill of exchange*, he is ſuable upon it *according to the cuſtom of* "*merchants*, for he makes himſelf a merchant, *pro tanto. And inland* "*bills were not known till trade grew to a great height; and when they ob-* "*tained, they received the ſame law with* OUTLANDISH *bills:* and he ſaid "he remembered that at a trial upon an inland bill before Hale, the "defendant's counſel would put the plaintiff to prove the cuſtom; "but Hale ſaid they had a hopeful point of it. *Et adjorn.*"

It does not appear that this caſe was finally decided, but the principal point, viz. that a bill or note payable to *bearer* was not a bill of exchange, had been before decided in the caſes of *Horton and Coggs*, *Hodges and Steward*, and *Nicholſon v. Sedgwick*, (before cited). But

theſe caſes, as before obſerved, were expreſsly denied to have been law, by Lord Mansfield and the other judges in the caſe of *Grant v. Vaughan*, 3. *Bur.* 1516.

The other point of the caſe, viz. that if the note had been made payable to him *or order*, the defendant, *by that form*, had made it negotiable, and the aſſignee might have ſued in his own name, is in ſtrict analogy with the whole current of authorities from the time of the firſt introduction of promiſſory notes; and the reaſon given is the ſame with that uſed in the caſe of *Grant and Vaughan*, viz. that the defendant by the *orginal contract had made it negotiable*, and had made himſelf expreſsly liable to the action of the *aſſignee*. The further reaſon given by the court ſhows moſt clearly that a promiſſory note payable to order was an inland bill of exchange; "for, ſay the court, "if a man who is no merchant *will draw a bill of exchange*, he is ſua- "ble upon it according to the cuſtom of merchants, for he makes "himſelf a merchant *pro tanto*."

There was another ſimilar caſe at the ſame term, between *Jordan and Barloe*, 3. *Salk.* 67, where it is ſaid to be "ruled that where a "*bill* is drawn payable to W. R. or *order*, 'tis *within the cuſtom of mer-* "*chants*; and ſuch a bill may be *negotiated and aſſigned by cuſtom, and* "*the contract of the parties*; and an action may be grounded on it, "*though 'tis no ſpecialty*; but if 'tis made payable to W. R. or *bearer*, "'tis not within the cuſtom of merchants; and therefore, when upon "ſuch a bill, the plaintiff declared, that the defendant being a mer- "chant, had drawn a bill according to the cuſtom of merchants, *but* "*had not paid the money*, this declaration was held ill."

Although the inſtrument in this caſe is not expreſsly ſtated to be a promiſſory note, yet it ſeems ſtrongly implied from the expreſſions uſed. For it may be remarked, 1ſt, that it appears by all the reports of the time that the words *bill* and *note* were ſynonymous; that the term *promiſſory note* was not in uſe, and that generally whenever the term *bill* is uſed alone, it meant a promiſſory note.

2dly. It is ſaid that "a bill payable to W. R. or *order*, was within "the cuſtom of merchants." It was ſurely not neceſſary at that time to have decided ſolemnly that a bill *of exchange* was within the cuſtom of merchants.

3dly. It is ſaid that "ſuch a bill may be negotiated and aſſigned "by cuſtom *and the contract of the parties*, and an action may be

" grounded on it, *though 'tis no ſpecialty;*" which laſt expreſſion ſeems more applicable to a promiſſory note, than to a regular bill of exchange."

4thly. It is ſaid that " the defendant *drew* a bill, *but had not paid* " *the money;*" without naming any drawee, or a non-acceptance or non-payment by the drawee, or any other circumſtance to ſhew that the drawer was liable to pay the money.

5thly. The points decided are preciſely thoſe mentioned in the preceding caſe of *Carter v. Palmer.*

In the caſe of *Crawley v. Crowther*, 2 *Freem.* 257, *(Trin.* 1702,*)* in chancery, it was ſaid, that " it is now likewiſe held, and the prac- " tice is ſo, that if a man gives a note for money, payable on demand, " *he need not prove any conſideration.*"

Lawſon v. Lamb, *(Hill.* 12. *W.* 3. *C. B. Anno* 1700*)* 1 *Lut.* 274, was another caſe upon a promiſſory note by aſſignee of payee, a bankrupt, againſt the maker of the note. The pleadings are ſet forth at large, and it appears that the plaintiff declared upon the *cuſtom of merchants within the realm of England*, upon a note payable to the bankrupt *or order.*

" The objection to the declaration was, that all the proceedings of " the commiſſioners of bankrupt ought to be alleged at large; but by " reaſon of divers precedents *according to the declaration here*, judgment " *per tot. cur'* was given for the plaintiff."

In *Trin. term* of the ſame year, it is ſaid by *Comyns*, *in his digeſt*, *p.* 191, *of vol.* 1, that in the caſe of *Butcher v. Swift*, *in B. R. it was doubted*, whether a promiſſory note to A. or order, was within the cuſtom of merchants, and whether the aſſignee could bring an action upon it in his own name. This caſe, it is believed, has not been reported.

In 1 *Salk.* 183, *Ford v. Hopkins*, *(Hill.* 12. *W.* 3.*)* lord Holt is reported to have ſaid at *niſi prius*, " that goldſmiths notes to pay mo- " ney or tickets, are *evidence of the receipt of money.*" As he had before ſaid that every indorſement makes a new bill, it ſeems to follow that an *indorſement* is alſo evidence of the receipt of money.

We have now examined all the reported caſes upon promiſſory notes, from the time of the firſt introduction of inland bills, to the time of lord Holt's deciſion in the caſe of *Clerke v. Martin.* At leaſt, if any

others are to be found, they have eſcaped a diligent ſearch. They form a ſeries of deciſions for a period of more than 30 years, in which we diſcover an uncommon degree of unanimity, as well as of uniformity. We find the law clearly eſtabliſhed to be the ſame upon promiſſory notes as upon inland bills; and we find no evidence that the latter were in uſe before the former.

There is not a contradictory caſe, or even *dictum*, unleſs we conſider as ſuch the *doubt* expreſſed in the caſe of *Butcher v. Swift* cited by Comyns; but that caſe is not reported, and therefore it is impoſſible to ſay upon what ground the doubt was ſuggeſted. The caſes upon promiſſory notes and inland bills, go to eſtabliſh not only their likeneſs in every reſpect, but even their *identity*; for the former are almoſt uniformly called inland bills.

V. Upon examining the printed books of precedents during the above period, we ſhall find that the *common uſage* was to declare upon a promiſſory note as upon an inland bill of exchange.

The firſt precedent of a declaration upon a promiſſory note is that in *Brownlow latine redivivum p.* 74, which is prior to any of the declarations upon inland bills of exchange. It is in ſubſtance as follows, that there is and was from time immemorial a cuſtom among merchants at the city of Exeter, and merchants at Croziet, that if any merchant at Croziet ſhould make any *bill of exchange*, and by the ſaid bill ſhould *acknowledge himſelf to be indebted* to another merchant in any ſum of money *to be paid to ſuch other merchant or his order*, and ſuch merchant to whom the ſame ſhould be payable, ſhould *order* ſuch ſum to be paid to another merchant, and ſuch merchant to whom the ſame was payable ſhould requeſt the merchant who acknowledged himſelf ſo as aforeſaid to be indebted, to pay ſuch ſum to ſuch other merchant to whom he had ordered the money to be paid; and if upon ſuch requeſt the merchant who acknowledged himſelf to be indebted in the ſum in ſuch bill and indorſement mentioned, ſhould accept thereof, then he would become chargeable to pay the ſaid ſum to the perſon to whom it was by the ſaid bill and indorſement directed to be paid at the time in the ſaid bill mentioned, according to the tenor thereof. It then avers that on the 8*th May* 1678, the defendant according to the cuſtom aforeſaid, *acknowledged himſelf to be indebted* to one M. M. in 52*s.* which he *obliged himſelf and his aſſigns* (this is probably miſprinted) to pay to the ſaid M. M. who by indorſement on the ſame *bill of exchange* on at ordered the money to be paid to the plaintiff, which bill of exchange afterwards, to wit, on at the defendant *ſaw and accepted*, by which acceptance and by the uſage aforeſaid the

defendant became liable, &c. and in conſideration thereof promiſed to pay, &c.

There is in the ſame book p. 77, a declaration upon a bill of exchange at *double uſuance*, which is probably upon an *inland* bill, as the cuſtom is alleged generally *among merchants*, but does not ſay at what place.

The next declaration on a promiſſory note is in the caſe of *Horton v. Coggs*, 3 *Levinz* 296. The note is dated 1ſt October, 4 Jac. 2. The cuſtom is alleged to be in London, that if any merchant or goldſmith in London ſhould make a *bill or note* in writing, with his name ſubſcribed, and thereby *promiſe to pay to any perſon or bearer*, &c.

In Clift's Entries 918, is a declaration upon an inland *bill of exchange*, calling it a *note*, and the word *bill* is not mentioned in the whole count. This ſhows that the words *bill* and *note* were conſidered as ſynonimous.

In the ſame book 899, *Turner v. Toſt* is a declaration by the *indorſee v. the maker* of a promiſſory note dated 6th November 1684. It ſtates that *within this realm of England*, viz. at the city of Briſtol, there is and from time immemorial has been a *cuſtom among merchants*, &c. uſed and approved, viz. that if any merchant or other perſon uſing commerce, &c. make any note under his proper hand and thereby *promiſe to pay* to any other merchant, &c. in the ſame note mentioned, *or to his order*, any ſum of money at any time in ſuch note ſpecified; and ſuch merchant, &c. to whom or to whoſe order the ſame is payable, &c. by indorſement of the ſaid note, appoint ſuch ſum of money in the note mentioned, to be paid to any other merchant, &c. in the ſaid indorſement mentioned, or to his order, then ſuch perſon who ſubſcribed ſuch note, having notice of ſuch indorſement, is chargeable, and for the whole time aforeſaid hath been accuſtomed to be chargeable, to pay the ſum of money in ſuch note mentioned, to the perſon in ſuch indorſement mentioned, at the time in ſuch note limited for the payment thereof, according to the tenor of ſuch note. It then ſets forth the facts to bring the caſe within the cuſtom, by reaſon of which, *and of the cuſtom aforeſaid*, the defendant became liable, &c. and ſo being liable in conſideration thereof promiſed to pay, &c.

The next precedent is in the caſe of *Sheppard and Bragg v. Flemyng (Mich. 5 W. and M.) Clift. Ent.* 929, *Indorſees v. Maker.* "Whereas "the ſaid Flemyng on 28th October 1692, at, &c. according to the "cuſtom of merchants in that caſe uſed and approved, made his cer-"tain *bill* in writing, and the ſame *bill* with his proper hand ſubſcribed, "and by the ſaid bill promiſed to pay to one *George Maſon or order*, the

" ſum of £. 40 upon the 28th day of November then next following, " for value received, and whereas the ſaid George Maſon afterwards, " viz. on at by indorſement with his proper hand ſubſcribed " upon the ſaid *bill* according to the uſage and cuſtom of merchants " aforeſaid in that caſe uſed and approved, appointed the contents of " the ſaid *bill* to be paid to the ſaid William Sheppard and Joſeph " Bragg, by the name of William Sheppard and company, in the ſaid " indorſement named, whereof the ſaid Flemyng then and there had " notice, by reaſon of which premiſes and by the cuſtom of merchants " in that behalf uſed and approved, he was liable, &c. and being ſo " liable, in conſideration of the premiſes, promiſed to pay," &c.

In Clift. Ent. 916, in the caſe of *Gibb's admx. v. Fowle and Wootton* is a declaration upon the cuſtom of merchants, by adminiſtratrix of the payee againſt the maſter, upon a promiſſory note made by his ſervant, dated 29th May, 1693. *See alſo* 1 *Wentworth's ſyſtem of pleading* 346.

In p. 914, in the caſe of *Dymes v. Smith (Mich.* 8, *W.* 3.) is a declaration on the cuſtom, by the payee againſt the maſter upon a like note made by the ſervant, 7th May 1696. And in p. 913, in the caſe of *Wiſeman v. Conyers*, is another, upon the cuſtom, by the indorſee againſt the maker of a promiſſory note, dated 4th May 1686.

In 2 Mod. Intr. 126, is another declaration upon the cuſtom by the *indorſee* againſt the maker of three promiſſory notes, dated in 1697. This declaration is preciſely like a modern declaration upon a promiſſory note, excepting that the note is called a *bill*, and is ſaid to be made and indorſed " *according to the cuſtom of merchants*," " whereby accord- " ing to the cuſtom of merchants," the defendant became liable, and ſo being liable, &c.

In p. 122 is another by payee *v.* the maker of a promiſſory note calling it a " *bill or note*," and ſetting forth the cuſtom ſpecially.

In every caſe upon a promiſſory note the declaration is grounded on the cuſtom of merchants.

Upon a review of this liſt of authorities and precedents we are at a loſs to imagine from what motive and upon what grounds, lord Holt could at once undertake to over-rule all theſe caſes, and totally change the law as to promiſſory notes: and why he ſhould admit inland bills of exchange to be within the cuſtom of merchants, and deny that privilege to promiſſory notes; when the ſame evidence

which proved the former to be within the cuſtom equally proved that it extended to the latter. By examining the books it will be found that moſt of the points which have been decided reſpecting inland bills of exchange, have been decided upon caſes on *promiſſory notes*. If he conſidered promiſſory notes as a new invention, when compared with inland bills of exchange, he ſeems to have miſtaken the fact; for the probability is that the former are the moſt ancient, or, to ſay the leaſt, are of equal antiquity.

VI. But let us proceed to examine the caſe of *Clerk v. Martin*, (*Paſch.* 1 *Anne*, *B. R.*) 2 *lord Ray.* 757. 1 *Salk.* 129, upon which alone is founded the aſſertion in modern books "that before the ſtatute of Anne promiſſory notes were not aſſignable or indorſeable over within the cuſtom of merchants, ſo as to enable the indorſee to bring an action in his own name againſt the maker." The caſe is thus reported by lord Raymond:

"The plaintiff brought an action upon his caſe againſt the defend-
"ant upon ſeveral promiſes; one count was upon a general *indebita-*
"*tus aſſumpſit* for money lent to the defendant; another was upon
"the *cuſtom of merchants as upon a bill of exchange*; and ſhewed that
"the defendant *gave a note ſubſcribed by himſelf, by which he promiſed to*
"*pay* to the plaintiff or *his order*, &c. Upon *non aſſumpſit*
"a verdict was given for the plaintiff, *and entire damages*. And it was
"moved in arreſt of judgment, *that this note was not a bill of exchange*
"*within the cuſtom of merchants*, and therefore the plaintiff, having de-
"clared upon it as ſuch, was wrong; but that the *proper way* in ſuch
"caſes is to declare upon a general *indebitatus aſſumpſit* for money
"lent, *and the note would be good evidence of it.*

"But it was argued by Sir Bartholomew Shower, the laſt
"Michaelmas term, for the plaintiff, that this note being payable to
"the plaintiff or his order, was a bill of exchange inaſmuch as *by its*
"*nature* it was negotiable; and that diſtinguiſhes it from a note pay-
"able to I. S. or *bearer*, which he admitted was not a bill of exchange
"*becauſe it is not aſſignable* nor indorſable *by the intent of the ſubſcriber*,
"and conſequently not negotiable, and therefore it can not be a bill
"of exchange, becauſe it is incident to the nature of a bill of ex-
"change to be negotiable; but here *this* bill *is* negotiable, *for if it had*
"*been indorſed payable to I. N. I. N. might have brought his action upon*
"*it as upon a bill of exchange, and might have declared upon the cuſtom of*
"*merchants.* Why then ſhould it not be, *before ſuch indorſement*, a
"bill of exchange *to the plaintiff himſelf*, ſince the defendant by his
"ſubſcription has ſhown *his intent* to be liable to the payment of this

" money to the plaintiff *or his order*; and *ſince he hath thereby agreed* " *that it ſhall be aſſignable over*, which is by conſequence that it ſhall be " a bill of exchange. That there is no difference in reaſon between " a note which ſaith, " I promiſe to pay to I. S. or order," &c. and a " note which ſaith, " I pray you to pay to I. S. or order," &c. they are " both equally negotiable, and to make ſuch a note a bill of exchange " can be no wrong to the defendant, becauſe he, by the ſigning of the " note, has made himſelf to that purpoſe a merchant, (2 Vent. 292. " *Sarsfield v. Witherly*) *and has given his conſent that his note ſhall be ne-* " *gotiated*, and thereby has ſubjected himſelf to the law of merchants."

" But Holt, chief juſtice, was *totis viribus* againſt the action; *and* " *ſaid that this could not be a bill of exchange.* That the maintaining " of theſe actions upon ſuch notes, *were innovations upon the rules of the* " *common law; and that it amounted to a new ſort of ſpecialty unknown to the* " *common law, and invented in Lombard ſtreet, which attempted in theſe mat-* " *ters of bills of exchange to give laws to Weſtminſter Hall. That the continuing* " *to declare upon theſe notes upon the cuſtom of merchants proceeded upon obſtina-* " *cy and opinionativeneſs*, ſince *he* had *always* expreſſed his opinion againſt " them, and *ſince there was ſo eaſy a method as to declare upon a general* " *indebitatus aſſumpſit for money lent*, &c. As to the caſe of Sarsfield " v. Witherly, he ſaid he was not ſatisfied with the judgment of the " king's bench, and that he adviſed the bringing a writ of error.

" *Gould*, juſtice, ſaid, that he did not remember it had ever been " adjudged that a note in which the ſubſcriber *promiſed to pay*, &c. *to* " *I. S. or bearer*, *was not a bill of exchange*. That the *bearer* could " not ſue an action upon ſuch a note in his own name, *is without doubt;* " and ſo it was reſolved between *Horton and Coggs*, now printed in 3 " *Lev.* 299, but that it was never reſolved *that the party himſelf* (to " whom ſuch note was payable) could not have an action *upon the* " *cuſtom of merchants upon ſuch a bill.* But Holt, chief juſtice, anſwer- " ed that it was held in the ſaid caſe of *Horton v. Coggs*, that ſuch a " note was not a bill of exchange within the cuſtom of merchants. " And afterwards in this Eaſter term it was moved again, and the " court continued to be of opinion againſt the action. And then " Mr. Branthwaite for the plaintiff urged, that if this note was not " a bill of exchange within the cuſtom of merchants, then the pro- " miſe founded upon it was void; and then it could not be intended " that any damage was given by the jury for the breach of it, but all " the damages muſt be intended to have been given upon the general " *indebitatus aſſumpſit*. Holt, chief juſtice, ſaid that would be true, " if it had been void by reaſon of its being inſenſible; but this mat- " ter is ſenſible enough, *though not ſufficient in law to raiſe a promiſe;*

" and therefore one cannot intend but that damages were given for " it; and conſequently that judgment muſt be arreſted. And judg- " ment was given *quod querens nil capiat per billam*, &c. by the opi- " nion of the whole court."

As four other caſes are reported upon this ſubject prior to the ſtatute of Anne, all of which were dependant upon this of *Clerk and Martin*, it may be proper to notice what fell from the court in each, before any comments are made on that caſe.

At the ſame term, the caſe of *Potter v. Pearſon*, 1 *lord Ray.* 759, was upon a writ of error from C. B. In which the court ſaid, " it is " a void cuſtom, ſince it binds a man to pay money *without any conſi-* " *deration*; for the rule is, *ex nudo pacto non oritur actio.* And there- " fore the judgment was *reverſed.*"

In the caſe of *Burton v. Souter*, at the next term, (2 *Lord Ray.* 774,) it was moved in arreſt of judgment, " that ſuch a note is not within " the cuſtom of merchants, but they ought to declare upon a *mutuatus* " *and give the note in evidence*, as it was ſettled laſt term between *Clerk* " *and Martin. And of that opinion was the whole court.*"

The caſe of *Williams v. Cutting*, at the next term, (2 *Lord Ray.* 825. *Farr.* 154.) was another writ of error from the C. B. There were two counts: 1, *on the cuſtom of merchants*, declaring upon a note given by the defendant to the plaintiff promiſing to pay him ſo much money. 2, Upon an *indebitatus aſſumpſit.* There were *ſeveral* damages, but only one judgment; and it was aſſigned for error that the count upon the cuſtom of merchants was void; and therefore there being one entire judgment, all was void, and judgment ought to be reverſed *in toto.* And the caſe of *Clerk and Martin*, was quoted as an authority in point.

The court were all of opinion that, " if one of the declarations was " ſuch on which no damages ought to be recovered, it would be bad." And *per Holt*, as to that point he had " propoſed it to all the judges, and " that they were all of opinion that a declaration upon the cuſtom of " merchants upon a note ſubſcribed by the *defendant to the plaintiff* for " ſo much money, or promiſing ſo much money was void; *for it tend-* " *ed to make a note amount to a ſpecialty.* And judgment thereupon was " reverſed *in toto.*"

Lord Raymond does not mention this laſt obſervation of Lord Holt, but ſays, " Note, *all the judges held clearly that the firſt count was ill,*

" (according to the caſe of *Clerk v. Martin,*) *except Powell, juſtice, who* " *doubted.*"

The next and laſt caſe in the books before the ſtatute of Anne, is that of *Buller v. Crips (Mich.* 2 *Anne, Anno* 1703.) 6 *Mod.* 29. " A " note was in thia form, " *I promiſe to pay to I. S. or order, the ſum of* " *£.* 100, *an account of wine had of him.*" " I. S. indorſes this note " to another; the *indorſee* brings the action againſt *him that drew the* " *note,* and *declares upon the cuſtom of merchants, as upon a bill of exchange;* " and a motion was in arreſt of judgment, upon the authority of *Mar-* " *tin and Clerk's caſe.*

" But Brotherick would diſtinguiſh this caſe from that; for there " the *party to whom the note was originally made* brought the action, but " here it is by *indorſee:* and he that gave this note, did, by the tenor " thereof, make it *aſſignable* or negotiable by the words "*or order,*" " *which amounts to a promiſe, or undertaking, to pay to any whom he* " *ſhould appoint, and the indorſement is an appointment to the plaintiff.*"

" *Chief juſtice Holt.* I remember when actions upon inland bills " of exchange did firſt begin; and there they laid a particular cuſtom " between London and Briſtol, and it was an action againſt the ac- " ceptor. The defendant's counſel would have put them to prove the " cuſtom; at which Hale who tried it laughed and ſaid, They had a " hopeful caſe on't. And in my Lord North's time it was ſaid that the " cuſtom in that caſe was part of the common law of England, and " the actions ſince became frequent as the trade of the nation did in- " creaſe; and all the difference between foreign and inland bills is, " that foreign bills muſt be proteſted before a public notary, before " the drawer may be charged; but inland bills need no proteſt. *And the* " *notes in queſtion are only an invention of the goldſmiths in Lombard ſtreet,* " *who had a mind to make a law to bind all thoſe that did deal with them. And* " *ſure to allow ſuch note to carry any lien with it, were to turn a piece of pa-* " *per, which is in law but evidence of a parol contract,* into a ſpecialty, and " beſides to empower one to aſſign that to another, which he could " not have himſelf; for ſince he to whom this note was made could " not have *this* action, how can his aſſignee have it? *And theſe notes* " *are not in the nature of a bill of exchange;* for the reaſon of the cuſ- " tom of bills of exchange is, for the *expedition of trade,* and its *ſafety;* " and likewiſe it *hinders the exportation of money* out of the realm.

" He ſaid, if indorſee had brought this action againſt *indorſer,* it " might peradventure lie, *for the indorſement may be ſaid to be tanta-* " *mount to drawing a new bill for ſo much money as the note is for, upon the*

" *perſon that gave the note*; or he may ſue the *firſt* drawer in the name " of the indorſer, and convert the money, when recovered, to his " own uſe; for the indorſement amounts *at leaſt* to an agreement, " that the indorſee ſhould ſue for the money in the name of the in- " dorſer, and receive it to his own uſe. And beſides, it is a good au- " thority to the original drawer to pay the money to indorſee. And " Powell juſtice cited one caſe where a plaintiff had judgment upon " a declaration of this kind in the common pleas; and that my lord " Treby was very earneſt for it, as a *mighty* convenience for trade; " but that when they had conſidered well the reaſons why it was " doubted here, they began to doubt too; and the whole court ſeem- " ed clear for ſtaying the judgment. And at another day the chief " juſtice declared, that he had deſired to ſpeak with two of the moſt " famous merchants in London, to be informed of the *mighty* ill con- " ſequences that was pretended would enſue by *obſtructing this courſe*; " and that they had told him, *it was very frequent with them to make* " *ſuch notes, and that they looked upon them as bills of exchange, and that* " *they had been uſed for a matter of thirty years*; and that not only *notes* " but bonds for money, were transfered frequently, and endorſed as " bills of exchange. *Indeed I agree* a bill of exchange may be made " between *two* perſons *without a third*; and if there be ſuch a neceſſi- " ty of dealing that way, why do not dealers uſe that way which is " legal? and may be this; as if A. has money to lodge in B,'s " hands, and would have a negotiable note for it, it's only ſaying " thus; " *Mr. B. pay me, or order, ſo much money, value to yourſelf*;" " and ſigning this, and B. accepting it; or he may take the *common* " *note* and ſay thus; *for value to yourſelf*, pay *indorſee* ſo much; and " good. *And the court at laſt took the vacation to conſider of it.*" But what became of the caſe afterwards does not appear.

Theſe five caſes, viz. *Clerk v. Martin*, *Potter v. Pearſon*, *Burton v. Souter*, *Cutting v. Williams*, *and Buller v. Crips*, are the only reported caſes in which the former deciſions were over-ruled, and it may be obſerved that the four laſt were decided upon the authority of the firſt which is to be conſidered as the leading caſe; and it is in that caſe, therefore, that we are to look for the grounds upon which ſo great a change of the eſtabliſhed law was founded. We ſhall however conſider the reaſons that are ſcattered among the whole, as having concurred in the formation of lord Holt's opinion. In the firſt place, we find an aſſertion of his lordſhip, in *Clerk v. Martin*, " that this " note *could not be* a bill of exchange," but he ſeems to have been too much irritated at that time to give a reaſon for the aſſertion, or to re-collect that in the caſe of *Hill v. Lewis*, upon *promiſſory notes*, he had ſaid " *that goldſmith's bills were governed by the ſame laws and cuſtoms as*

" *other bills of exchange*," and that *the verdict* in *that case* would be *good* " *if found upon the bills of exchange.*"

His next assertion is, " that the maintaining these actions upon such " notes, were *innovations upon the rules of the common law.*"

But if, as we have shown, the custom of merchants is a part of the common law; if promissory notes had always, from the time of their first introduction, been adjudged to be as much within the custom of merchants, as inland bills of exchange, then an action on a promissory note, founded on the custom, was not more an innovation than a like action upon an inland bill of exchange. Besides, that could hardly deserve the name of innovation, which had been sanctioned by *all the judges of England, on a demurrer*, as was the case in *Williams and Williams.*

His next assertion is, " that it amounted to the setting up *a new* " *sort of specialty*, unknown to the common law, and invented in *Lom-* " *bard street.*" To this it may be answered that it did not amount to the setting up a specialty, because the consideration of a specialty is not examinable at law; but between immediate parties to a bill of exchange or a promissory note the defendant might always have availed himself of the want of consideration. It only amounted at most to the setting up a promissory note as a bill of exchange. The assertion that promissory notes were invented in Lombard street, is certainly not correct, for Malynes mentions them as in use in foreign countries, and as being assignable by the custom of merchants, long before they appear to have been introduced into England.

The other assertions of his lordship only tend to shew a degree of irritation which derogates from the respect which the decision might otherwise deserve. The mildness of Mr. Justice Gould, forms a contrast with the precipitation of the chief justice. He said, " he did " not remember that it had ever been adjudged, that a note in which " the subscriber promised to pay, &c. to I. S. or bearer, was not a " bill of exchange;" and that it was never resolved, that the party " himself, to whom such note was payable, could not have an action " *upon the custom of merchants* upon such a bill."

In the case of *Potter v. Pearson*, it was said that " it is a void " custom, *since it binds a man to pay money without consideration.*" This reason equally applies to *inland bills*, and is no reason why a distinction should be taken between *them*, and promissory notes payable to order. The one is as much a mercantile transaction as the other;

and "a *nudum pactum* does not exiſt in the uſage and law of mer-"chants," nor is "the want of conſideration an objection in com-"mercial caſes." 3 *Bur.* 1669. 1 *Powell on Con.* 341.

The caſe of *Burton v. Souter*, furniſhes no new reaſon, but relies entirely upon the caſe of *Clerk v. Martin.*

The caſe of *Williams v. Cutting*, as reported by *lord Ray.* 825, ſhews only that Mr. Juſtice Powell doubted upon the caſe of Clerk and Martin. But in *Farr.* 155, it appears that Holt ſaid, "he had "propoſed it to all the judges, and that they were *all* of opinion that "a declaration upon the cuſtom of merchants upon a note was void; "*for it tended to make a note amount to a ſpecialty.*" It has been before ſhewn that this reaſon was not founded in *fact*; and it may be further remarked that if true in point of fact, yet it would equally apply to inland bills, and therefore is no ground for a diſcrimination. But it appears by lord Raymond, that all the judges did not agree, for *Powell doubted.*

The caſe of *Buller and Crips*, differed from the others in this, that the action was brought by the firſt *indorſee*, and not by the payee of the note. Lord Holt again declares that "the notes in queſtion are "only an invention of the goldſmiths in Lombard-ſtreet," in which he was certainly miſtaken. He repeats that "to allow ſuch a note to "carry any lien with it were to turn a piece of paper, which is in "law but evidence of a parol contract, *into a ſpecialty*;" and the reaſon which he gives why this caſe ought not to be diſtinguiſhed from that of *Clerk v. Martin*, is that a man can not aſſign that which he has not himſelf. But it is not as *aſſignee* that the indorſee was intitled to his action, but as the payee of a bill of exchange; for an indorſed note is a bill drawn, by the payee of the note, upon the maker, in favour of the indorſee; and the maker accepts the bill when he ſigns the note, for it is no objection to the acceptance of a bill that the acceptance is made before the bill. However, if the judgment in *Clerk and Martin*, was againſt law, the foundation of lord Holt's opinion in this caſe muſt fail. His lordſhip again aſſerts that, "theſe notes are not "in the nature of a bill of exchange;" and he now condeſcends to give his reaſons why they are not; "for the reaſon of the cuſtom of "bills of exchange is for *the expedition of trade*, and its *ſafety*; and "likewiſe it *hinders exportation of money out of the realm*;" in each of which reaſons he is equally unfortunate, for the expedition of trade is not more promoted, nor is its ſafety more ſecured by *inland bills* than by promiſſory notes, nor is the exportation of money more prevented by the former than by the latter. Indeed it is in modern times

fully admitted, that payment by bills on a foreign country has no effect either by increasing or diminishing the current coin of a nation. For payment of a sum by exchange prevents the importation of exactly the same sum of money.

But lord Holt himself admitted that "if the indorsee had brought "*this* action against the *indorser*, it might peradventure lie; *for the* "*indorsement may be said to be tantamount to the drawing a new bill for so* "*much as the note is for, upon the person that gave the note;* or he may sue "the first drawer in the name of the indorser, and convert the money, "when recovered, to his own use; for the indorsement amounts *at* "*least* to an agreement that the indorsee should sue for the money in "the name of the indorser, and receive it to his own use; and be- "sides it is a good authority to the original drawer to pay the money "to the indorsee."

If this indorsement makes it a bill of exchange for one purpose, the reason is not easily perceived why it should not be a bill of exchange for other purposes. The express promise of the maker to pay the money to the indorsee seems to be at least equal to an acceptance of the bill; and, as it has been before observed, a bill may be accepted before it is in fact drawn; 3 *Bur.* 1663, *Doug.* 284, 1 *Atk.* 715, (611,) *Kyd* 48. A bill drawn by a man *on himself* "is payable by him at all "events," and such a bill "is tantamount to an acceptance." 1 *Went. system of pleading*, 225.

Lord Holt admits also that the indorsement will authorize the indorsee to sue in the name of the indorser; hence it appears that the whole dispute was merely about the *form* of the action; and this renders it the more astonishing that he should have contended "*totis viribus*," as lord Raymond says he did, for an exception so clearly contrary to the justice of the case, especially as the point had been before so solemnly settled in the case of *Williams and Williams*. Indeed his lordship seems, by the latter part of the report of *Buller v. Crips*, to have relented a little, after his conversation with the merchants, for he agreed "that a bill of exchange may be made between two persons "without a third" by saying thus, "Mr. B. pay me, or order, so much "money, value to yourself; and signing this and B. accepting it. Or "he may take the *common note* and say thus, For value to yourself, pay "*indorsee* so much; and good."

This last example seems to have been precisely the case before the court; and as the court adjourned without giving judgment, it seems

to be doubtful how they would have decided, notwithſtanding what had been ſaid before.

Hence then we find, from an examination of all the caſes before the ſtatute of Anne, *that it never was adjudged that a promiſſory note for money payable to order, and indorſed, was not an inland bill of exchange.* But we find that the contrary principle had been recognized in all the caſes from the time of the firſt introduction of inland bills and promiſſory notes to the firſt year of Queen Anne, and that in one of them it had been *expreſsly adjudged upon demurrer* in the king's bench, and the *judgment affirmed upon argument in the exchequer chamber*, before all the judges of the common pleas and barons of the exchequer, ſo that it may truly be ſaid to have been ſolemnly adjudged by all the judges of England. Principles of law ſo eſtabliſhed are not to be ſhaken by the breath of a ſingle judge, however great may be his learning, his talents or his virtues. That lord Holt poſſeſſed theſe in an eminent degree will never be denied; but he was not exempt from human infirmity. The report itſelf, in the caſe of *Clerk v. Martin*, ſhows that, from ſome cauſe or other, he was extremely irritated with the goldſmiths of Lombard ſtreet, and that his mind was not in a proper ſtate for calm deliberation and ſound judgment. The ſame obſervation applies to the caſe of *Buller v. Crips*, and is further confirmed by that of *Ward and Evans*, 2 *lord Ray.* 930, in which his lordſhip ſaid "But then I am of opinion and always was *(notwithſtanding the* "*noiſe and cry, that it is the uſe of Lombard ſtreet, as if the contrary opi-* "*nion would blow up Lombard ſtreet)* that the acceptance of ſuch a note "is not actual payment." This circumſtance has alſo been noticed by judges and others, in ſome of the more modern reports. In the caſe of *Grant v. Vaughan*, 3 *Bur.* 1520, Sir Fletcher Norton and Mr. Dunning obſerve that "*lord Holt* was *peeviſh*" in the caſe of *Clerk and Martin*, and *lord Mansfield* remarked that "*lord Holt got* "*into a diſpute with the city about it.*" In 1 *W. Bl.* 487, *lord Mansfield* ſaid, "The firſt ſtruggle of the merchants, *(which made Holt ſo angry* "*with them,)* to make *inland bills* in the nature of *ſpecialties*, and to "declare upon them as ſuch, was certainly wrong on their parts; as "*it was admitted* they might declare on general *indebitatus aſſumpſit*, "and give theſe bills in evidence. But the reaſons given by the "judges, why no action can be brought by the holder of ſuch a bill, "payable to bearer, are equally ill-founded." And in the caſe of "*Brown and Harraden*, 4 *Term Rep.* 151, *lord Kenyon* ſaid, it is not "neceſſary now to conſider whether or not *lord Holt* were *right* in ſo "*pertinaciouſly* adhering to his opinion, before the ſtatute of Anne, "that no action could be maintained on promiſſory notes, as inſtru-"ments, but that they were only to be conſidered as evidence of the

" debt: that queſtion exerciſed the judgments of the ableſt men at " that time; *but the authority which his opinion had in Weſtminſter Hall,* " *made others yield to him;* and *it was thought neceſſary* to reſort to the " legiſlature to apply a *remedy.*" And in the ſame caſe, p. 154, Buller, juſtice, ſaid " The caſes cited by the defendant's counſel are " extremely material; for though they do not directly decide the queſ- " tion, they ſhew that the courts of Weſtminſter have thought the " *analogy* between bills of exchange and promiſſory notes *ſo ſtrong* " *that the rules eſtabliſhed with reſpect to one ought alſo to prevail as to the* " *other.* Such is the general tendency of the caſes ſince lord Manſ- " field's time. Many of the caſes alluded to by the plaintiff's coun- " ſel, happened before the ſtatute of Anne: they *only* ſhew the *ſtrong* " *diſpoſition which lord Holt manifeſted on all occaſions to diſcourage promiſ-* " *ſory notes.* It appears from them that *lord Holt* and the merchants " *were perpetually diſputing whether* or not they ſhould be put upon the " ſame footing with bills of exchange. The merchants did not con- " tend that they might recover on notes in *particular caſes only, but* " *that they ſhould be univerſally conſidered in the ſame light as bills of ex-* " *change.* Upon that ground they applied to the legiſlature for *relief,* " *and their conduct is very ſtrong to ſhew what conſtruction the ſtatute of* " *Anne ought to receive.*"

Lord Kenyon ſaid " it has been argued that there is an *eſſential* dif- " ference between bills of exchange and promiſſory notes; and that " there are reaſons why the acceptor of the one ſhould be allowed " more time than the maker of the other; *but I confeſs I ſee no difference* " *whatever; they both make engagements of the ſame nature,* and when the " acceptor has accepted a bill he is equally bound to be prepared to " pay on the day appointed, as the maker of a promiſſory note." Lord Hardwicke in the caſe of *Walmſley v. Child, anno* 1749, 1 *Vez.* 346, ſays, " The reaſon of making the ſtatute 3 *and* 4 *Anne* aroſe " from *ſome determinations,* in the beginning of her reign, by *Holt chief* " *juſtice,* that no action could be maintained *on* a promiſſory note, nor " declaration thereupon, viz. *Clerk v. Martin,* and *Potter v. Pearſon,* " 1 *Salk.* 129; *which caſes produced the act;* as the act itſelf recites; " but that act of parliament did not alter, but that ſtill an *indebitatus* " *aſſumpſit* may be brought, and the note given in evidence, or proved " if loſt." From this concurrent teſtimony it is apparent, that the caſe of *Clerk v. Martin* was a haſty intemperate deciſion of lord Holt, which was acquieſced in by the other judges, in conſequence of his overbearing authority, " which made others *yield* to him;" and that he ſo " *pertinaciouſly*" adhered to his opinion, as to render it neceſſary to apply to parliament to *over-rule him.*

This, it is believed, is the true origin of the ſtatute of Anne, which did not enact a *new law*, but ſimply confirmed the old; the authority of which had been ſhaken by the late deciſion of lord Holt. This idea is confirmed by the words of the preamble of the ſtatute, which are, "Whereas it *hath been held*" that notes in writing, &c. payable to order, "were not aſſignable or indorſable over, *within the* "*cuſtom of merchants*," and that the payee could "not maintain an ac-"tion, *by the cuſtom of merchants*," againſt the maker; and that the indorſee "could not, *within the ſaid cuſtom of merchants*, maintain an ac-"tion upon ſuch note" againſt the maker; "therefore, to the intent to "encourage trade and commerce," &c. Be it enacted, &c. that all notes in writing made and ſigned by any perſon, &c. whereby ſuch perſon, &c. ſhall promiſe to pay to any other perſon, &c. *or his order, or unto bearer*, any ſum of money, &c. "*ſhall be taken and con-*"*ſtrued to be, by virtue thereof, due and payable to any ſuch perſon*, &c. "*to whom the ſame is made payable;*" "and alſo every ſuch note pay-"able to any perſon," &c. "*or his order*, ſhall be aſſignable or in-"dorſable over, *in the ſame manner as inland bills of exchange* are or "may be, *according to the cuſtom of merchants*," and that the *payee* "may maintain an action for the ſame, *in ſuch manner as he might do* "*upon any inland bill of exchange, made or drawn according to the cuſtom* "*of merchants*, againſt the perſon, &c. who ſigned the ſame." And that the *indorſee* "may maintain his action," for ſuch ſum of money *either againſt the maker or any of the indorſers*, "*in like manner as in* "*caſes of inland bills of exchange.*" Here it may be obſerved, that by uſing the words, "*it hath been held*," the legiſlature clearly allude to certain *opinions*, which they carefully avoid to recognize as law. And in the enacting clauſe they ſay that ſuch notes "*ſhall be taken and con-*"*ſtrued to be due and payable*," &c. expreſſing thereby a command to certain *perſons*, without ſaying expreſsly that the notes ſhall be due and payable, &c. for this being the law before it was not neceſſary to enact the thing itſelf, but to inſtruct the judges how they *ſhould conſtrue* it. The miſchief to be remedied was the opinion which had "*been held*," not any defect in the law itſelf. By comparing this act with the caſes decided prior to *Clerk and Martin*, it will be found to contain no principles but ſuch as had been fully recognized by the courts of law. It follows, therefore, that it was paſſed ſimply to reſtore the old order of things, which had been diſturbed by lord Holt.

The only real effect of the ſtatute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reaſon of *the cuſtom of merchants*, the *new* ſay that he became liable by *force of the ſtatute*. Even lord Holt himſelf always admitted that an *indebitatus aſſumpſit* for money had and received, or money lent,

would lie, and the note would be good evidence of it. His objections were only to the form of the action, and not to the liability of the parties.

A promiſſory note was always as much a *mercantile inſtrument* as an inland bill of exchange, and there certainly ſeems to be more evidence that the former is within the cuſtom of merchants than the latter, and that it was ſo at an earlier period on the continent of Europe, from whence it was introduced into England; and when introduced it came attended with all the obligations annexed which the cuſtom had attached to it.

We ſometimes, in modern books, meet with an aſſertion that a promiſſory note was not negotiable at common law; this may be true, becauſe a promiſſory note was not known at common law, if from the term *common law* we exclude the idea of the cuſtom of merchants. It was a mercantile inſtrument introduced under the cuſtom of merchants. But if the cuſtom of merchants is conſidered, as it really is, a part of the common law, then the aſſertion that a promiſſory note was not negotiable at the common law, is not correct.

VIII. In the preſent caſe of *Dunlop v. Silver*, it is not neceſſary to enquire whether a promiſſory note, while it is confined to the original parties, can be conſidered as a bill of exchange within the cuſtom of merchants, although the authorities already cited ſhow it to have been ſo adjudged; but it is ſufficient if it become ſo by being indorſed. It has already been obſerved that it has never been decided that an indorſed promiſſory note is not a bill of exchange, or a negotiable inſtrument, under the cuſtom of merchants, but that the contrary has been ſolemnly adjudged; and has been ſettled law for more than a century.

One of the counts in the preſent caſe is for money *had and received*; and the evidence produced is a promiſſory note made by Cavan, payable to the defendants or order, by them indorſed to Downing and Dowell, and by them to the plaintiff. The note was in due time *proteſted*, as an inland bill of exchange, for non-payment, and due notice given to the defendants. So that every ſtep was taken which would have been neceſſary to charge the defendants as drawers, or indorſers of an inland bill.

The indorſement of the defendants is evidence of money received by them from the intermediate indorſers, and the only queſtion is, whether the money, ſo received, is for the uſe of the plaintiff. The

ſolution of this queſtion depends upon the *nature of the contract* which the defendants entered into by their indorſement. Lord Holt himſelf always admitted that every indorſement was the drawing of a new bill; and even in the caſe of *Buller v. Crips*, he admits that the indorſement of a promiſſory note is the drawing of a bill on the maker in favour of the indorſee, and that the indorſee may maintain an action againſt the indorſer *upon the cuſtom of merchants*. This principle, which ſo far from being denied, has *always* been recognized in the ſubſequent caſes, *Chitty* 121, 4 *T. R.* 149, decides the nature of the engagement which the defendants entered into by their indorſement. It was that of the drawer of an inland bill of exchange, whoſe obligation as ſuch is well aſcertained by the cuſtom of merchants. The plaintiff does not claim as *aſſignee* at common law, but as indorſee under the law merchant; by which law the defendants are clearly liable as drawers of the bill to pay the money to any indorſee, holder of the bill; and where the plaintiff has either an equitable or legal right to money received by the defendant, he may recover in an action for money had and received. The defendants, then, having received money (which they are clearly not entitled to hold, for it is admitted that the *intermediate* indorſer would be entitled to recover it againſt them) and being, by the terms of their contract, as conſtrued by the cuſtom of merchants, liable to the plaintiff, are anſwerable in an action for money had and received. We have ſeen that in the old declarations upon bills of exchange, the cuſtom of merchants is not alleged, and yet the courts preſumed that the advancer of the money was the factor of the plaintiff, through whom the plaintiff is ſuppoſed to pay the money to the defendant. In the caſe of *Woodward and Row*, before cited, the court ſaid expreſsly that they would "intend that he, of whom the value is ſaid to be received by the defendant, *was the plaintiff's ſervant*." Upon the ſame principle the intermediate indorſer is to be preſumed to be the ſervant of the plaintiff in the preſent caſe.

The indorſer of a promiſſory note, or bill of exchange, when he receives the money from the indorſee, holds it in truſt to be re-paid to the holder of the bill or note, if he ſhall fail to obtain it from the acceptor or maker, after uſing due diligence, and giving proper notice. When this contingency has happened, the truſt becomes abſolute, and it is againſt conſcience if the indorſer refuſes to pay the money to whom of right it belongs.

The argument on the part of the defendants in this action is, that as a promiſſory note is not an inſtrument negotiable by the cuſtom of merchants; as the ſtatute of *Anne* is not in force in Virginia, and as

the act of aſſembly of Virginia does not give an action againſt the *indorſer*, his engagement is only ſuch as ariſes at common law; which is only an *implied* contract to refund money which has been paid in contemplation of a conſideration that has failed. That this contract exiſts only between the indorſer and his *immediate* indorſee, and is ſuch a *choſe in action* as by the common law is not aſſignable. That it ariſes only in conſequence of the money paid, and is raiſed in favour of that perſon only from whom the money was received. That the payment of the money by the plaintiff to the intermediate indorſer raiſes no contract between the defendant and the plaintiff. That there is no *privity* between the plaintiff and defendant, whereby the plaintiff can derive any benefit from the contract made by the defendant with the intermediate indorſer; and that no action of *indebitatus aſſumpſit* will lie without ſuch privity. That even ſuppoſing the contract of the defendant was expreſs to pay the money to the intermediate indorſer, or to his order, yet that contract would not be negotiable or aſſignable ſo as to enable the plaintiff to recover in his own name, becauſe no conſideration moved from him, and no promiſe is made to him; and if the promiſe were in fact made to him, yet it would be as to him *nudum pactum*.

This argument, ſo far as it is neceſſary to conſider it, may be reduced to theſe five propoſitions:

1. That promiſſory notes are not negotiable within the cuſtom of merchants.

2. That the contract of the indorſer is only an implied contract, grounded on the receipt of money upon a conſideration that has failed.

3. That this contract is a *choſe in action*, not aſſignable.

4. That no action of indebitatus aſſumpſit will lie without *privity*.

5. That a promiſe in writing, without a conſideration expreſſed, is a nudum pactum.

The *firſt propoſition*, viz. that promiſſory notes are not negotiable within the cuſtom of merchants, has been fully conſidered, and ſeems not to be maintainable. It might therefore be deemed unneceſſary to examine the argument further; but as ſome of the other points are queſtionable, it may be worth while to notice them.

The 2*d proposition* is that the contract of the indorser is only an *implied* contract, grounded upon the receipt of money upon a consideration which has failed.

If this were true, it would equally apply to the case where a man receives a note with a blank indorsement and passes it away, for a valuable consideration, without indorsing it himself. But in such a case, no man has ever been held liable, unless there was an antecedent debt, or from particular circumstances a guaranty of the note could be presumed, or unless he knew the note to be a bad one at the time. 3 *T. R.* 759, 761, *Fenn v. Harrison.* This point was early decided in the case of the *Bank of England v. Newman* in 1 *lord Ray.* 442. It is true that this was a note payable to the defendant or *bearer*, but it has been held in the case of *Peacock v. Rhodes*, Doug, 636, (614,) and Doug. 639, *(617,) Ancher v. Bank of England*, that a note with a blank indorsement is exactly like a note payable to bearer. The reason is that the receiver of such a note takes it upon the credit of the parties named upon it, and gives no personal credit to the man who merely pays it away, without indorsement. The obligation of the indorser then does not arise from the receipt of money only, but in consequence of his having written his name upon the instrument. But the simple writing of his name upon the instrument can create no obligation unless it be the sign of a certain contract. Words are but representatives of ideas, and evidence of the intention of the contracting parties. Any other mode of conveying those ideas and testifying that intention, if equally certain, is equally capable of being the evidence of an express contract. The act of writing ones name upon the back of an instrument of a certain description, is as strong evidence of an express contract, as if it had been written in a thousand words. What the nature of that contract is, depends upon the nature of the instrument indorsed; but still it is not an implied, but an express contract. The terms of that contract are known by a reference to the usual mode of transacting business, the nature of the instrument, and the incidents which have been attached to it either by positive law, by common acceptation, or by judicial authority. The purpose for which a man puts his name on the back of a promissory note is well known, and can not be mistaken; it is to give credit to the note; but to answer that purpose it must be the sign of a contract to pay the money to the holder if the maker does not. Such is the common acceptation and understanding of the country. The signature of the defendants is as much evidence of such a contract, as it is of the receipt of the money, or of an order to pay the money to the indorsee. But it is said,

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3dly. That such a contract, being made with the immediate indorsee, is not negotiable, because it is a *chose in action* which by common law can not be assigned.

To this it may be answered, that the antiquated doctrine that a *chose in action* is not assignable was introduced in early times before negotiable instruments were in use, when trade was carried on in its simplest form, and when the principal, if not the only purpose intended to be answered by the rule, was to prevent maintainance in controversies respecting titles to land. It was to prevent the poor man from being oppressed by a powerful antagonist to whom his competitor might assign his title, and who by his wealth, his influence, or his power might pervert justice. At what time, or by what means, it was first applied to *personal* rights is not ascertained; but it seems clear that in its original adoption it was never intended to apply to those instruments which *by their nature* and the *original contract of the parties* were made negotiable. Every man has a natural right to make such contracts as he pleases, provided they are not repugnant to any positive law, nor injurious to others; and all contracts entered into without fraud or force, are legally and morally obligatory according to their spirit and intent. The reason of the rule was to prevent maintainance. (*Co. Lit.* 214.) But no man could be oppressed by maintainance who had expresly agreed to pay his debt to such person as his creditor should appoint. The reason of the rule failing, the rule itself cannot apply. Blackstone, (2 *Com.* 442,) calls it the *strict* rule of the *ancient* common law; and the reason given is "because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law." But it was a rule introduced for the benefit of the debtor, and every man may wave the benefit of a law introduced for his advantage. Blackstone says, "this *nicety* is now disregarded; though, in compliance with the *ancient* principle, the *form* of assigning a *chose in action* is in the nature of a declaration of trust," &c.

Woodeson says (*in vol.* 2. *p.* 387.) "It is a maxim of the common law that no chose in action can be granted or assigned. The policy whereof was to avoid a multiplicity of suits, by preventing those who would not prosecute their right themselves, from transferring it to others of a more litigious disposition; and *particularly* to prevent the granting of pretended titles to great men, whereby, saith sir Edward Coke, (1 *Inst.* 214, (*a.*) 266, (*a.*) "Justice might be trodden down." "*Perhaps the rule was more general than the mischief apprehended;* and having relation originally to *landed estates* was afterwards *unnecessarily* transferred to *personal* property. The doc-

" trine, however, *always* was, that a choſe in action was aſſignable " in equity for a valuable conſideration. Bills of exchange and pro- " miſſory notes are regularly aſſignable by indorſement; and if bonds, " policies of inſurance, and even judgments, are *in like manner* aſ- " ſigned for valuable conſideration, the aſſignee may ſue in the name " of the original claimant, and the latter will not now be permitted, " *even in the courts of common law*, to undo his own transfer, or un- " conſcientiouſly to obſtruct the plaintiff's ſuit. Where one of the " captors of a maritime prize, *before condemnation thereof*, transferred " his *proportionate ſhare* of the property taken, it was held that the *aſ-* " *ſignee* might maintain an action for the ſame, againſt the capturing " ſhip's agent, as for money received by him to the plaintiff's uſe." 1 *Wilſon* 211. *Morrough v. Comyns.*

Upon which caſe it may be obſerved, that the ſailor's right to a ſhare of the prize money was as clearly a *choſe in action* as a right to any other property not in poſſeſſion; and the aſſignment of ſuch right was as clearly within the old rule that a *choſe in action* is not aſ- ſignable; it is therefore a much ſtronger caſe than that of a debt which, by *the original contract itſelf*, the parties have made negotiable.

The caſes on this ſubject are collected in a very able argument of *judge Buller*, in the caſe of *Maſter v. Miller*, 4 *T. rep.* 340, and al- though the judgment in that caſe was contrary to his opinion, yet it was not given upon the point mentioned in that part of his argument which we ſhall cite. *Evans on bills*, 106, ſpeaking of this argument, ſays, " it furniſhes a greater ſhare of profeſſional inſtruction and a " more admirable ſpecimen of judicial reaſoning than can often be " found in an equal compaſs." " It is laid down," ſays the judge, " in our *old* books, that for avoiding maintenance *a choſe in action can* " *not be aſſigned* or granted over to another. *Co. Lit.* 214. *a.* 266. *a.* " 2 *Roll.* 45. *l.* 40. *The good ſenſe of that rule ſeems to me to be very* " *queſtionable; and in early as well as modern times, it has been ſo explain-* " *ed away, that it remains, at moſt, only an objection to the form of the* " *action in any caſe. In* 2 *Roll. ab.* 45, 46, it is admitted that an ob- " ligation or other deed may be granted, ſo that the writing paſſes; " but it is ſaid that the grantee cannot ſue for it *in his own name.* If " a third perſon be permitted to acquire the intereſt in a thing, whe- " ther he is to bring the action in his own name, or in that of the " grantor, does not ſeem to me to affect the queſtion of maintenance. " It is curious, and not altogether uſeleſs, to ſee how the doctrine of " maintenance has from time to time been received in *Weſtminſter* " *Hall.* At one time not only he who laid out money to aſſiſt another " in his cauſe, but he that by his friendſhip or intereſt ſaved him an

" expence which he would otherwiſe be put to, was held guilty of " maintenance, *Bro. tit. maintenance*, 7, 14, 17, *&c.* Nay if he offi- " ciouſly gave evidence, it was maintenance; ſo that he muſt have " had a *ſubpæna*, or ſuppreſs the truth. That ſuch doctrine, repugnant " to every honeſt feeling of the human heart, ſhould be ſoon laid " aſide, muſt be expected. Accordingly a variety of exceptions were " ſoon made; and amongſt others it was held, that if a perſon has " any intereſt in the thing in diſpute, though on contingency only, " he may lawfully maintain an action on it. 2 *Roll. ab.* 115. But " in the midſt of all theſe doctrines on maintenance, there was one " caſe in which the courts of law allowed of an aſſignment of a *choſe* " *in action*; and that was in the caſe of the crown; for the courts did " not feel themſelves bold enough to tie up the property of the crown, " or to prevent that from being transferred. 3 *Leon.* 198. 2 *Cro.* 180. " *Courts of equity from the earlieſt times* thought the doctrine *too abſurd* " *for them to adopt*; and therefore they always acted in direct con- " tradiction to it. And we ſhall ſoon ſee that courts of law alſo, " altered their language very much. In 12 *Mod.* 554, the court " ſpeak of an aſſignment of an apprentice, or an aſſignment of a bond, " as things which are good between the parties; and to which they " muſt give their ſanction, and act upon. So an aſſignment of a *choſe* " in action has always been held a good conſideration for a promiſe. " It was ſo in 1 *Roll. ab.* 29. 1 *Sid.* 212, and *T. Jones*, 222; and " laſtly by all the judges of England in *Moulſdale againſt Birchall*, 2 " *Black.* 820, though the debt aſſigned was uncertain. *After theſe* " *caſes we may venture to ſay that the maxim was a bad one, and that it pro-* " *ceeded upon a foundation which fails.* But ſtill it muſt be admitted that " though the courts of law have gone the length of taking notice of " aſſignments of *choſes in action*, and of acting upon them, yet in *ma-* " *ny caſes* they have adhered to the *formal* objection, that the action " ſhall be brought in the name of the aſſignor, and not in the name " of the aſſignee. *I ſee no uſe or convenience in preſerving the ſhadow,* " when *the ſubſtance is gone*; and that it is merely a ſhadow, is apparent " from the latter caſes, in which the courts have taken care *that it* " *ſhall never work injuſtice.* In *Bottomly v. Brooke*, *C. B. Mich.* 22, *G.* 3. " (1 *T. R.* 621,) which was debt on board, the defendant pleaded " that the bond was given for ſecuring £. 100, lent to the defendant " by *E. Chancellor*; and was given by her direction in truſt for her, " and *E. Chancellor* was indebted to the defendant in more money. " To this plea there was a demurrer, which was withdrawn by the " advice of the court. In *Rudge v. Birch*, *K. B. Mich.* 25. *G.* 3, " (1 *T. R.* 622,) on the ſame pleadings there was judgment for the " defendant. And in *Winch v. Keely*, *K. B. Hill.* 27. *G.* 3. (1 *T. R.* " 619,) where the obligee aſſigned over a bond, and afterwards be-

" came bankrupt, the court held that he might, notwithſtanding, main-
" tain the action. Mr. J. Aſhhurſt ſaid, " It is true that formerly
" courts of law did not take notice of an equity or a truſt; but of
" late years, as it has been found productive of great expence to ſend
" the parties to the other ſide of the *hall*, wherever this court have
" ſeen that the juſtice of the caſe has been clearly with the plaintiff,
" they have not turned him round upon this objection. Then if this
" court will take notice of a truſt, why ſhould they not of an equity.
" It is certainly true that a *choſe in action* can not ſtrictly be aſſigned,
" but this court will take notice of a truſt, and ſee who is beneficially
" intereſted." But admitting that on account of this *quaint maxim*,
" there may *ſtill* be *ſome* caſes in which an action can not be maintain-
" ed by an aſſignee of a *choſe in action* in his own name; it remains to
" be conſidered whether that objection ever did hold, or ever can hold,
" in the caſe of a *mercantile inſtrument or tranſaction*. The *law merchant*
" is a ſyſtem of equity, founded on the rules of equity, and governed
" in all its parts by plain juſtice and good faith. In *Pillan v. Van*
" *Mierop*, lord Mansfield ſaid, if a man agree to do what if finally ex-
" ecuted would make him liable, as in a court of equity, ſo in *mer-*
" *cantile tranſactions, the law looks on the act as done. I can find no in-*
" *ſtance in which the objection has prevailed in a mercantile caſe*; and in
" the two inſtances moſt univerſally in uſe, it undoubtedly does not
" hold, that is, in the caſes of *bills of exchange, and policies of inſurance.*"
(He might have added the caſe of *bills of lading*.) "The firſt is the
" preſent caſe; and bills are aſſignable by the cuſtom of merchants.
" So in the caſe of *policies of inſurance*, till the late act was made, re-
" quiring that the name of the perſon intereſted ſhould be inſerted in
" the policy, the conſtant courſe was to make the policy in the name
" of the broker, and yet the owner of the goods maintained an action
" upon it. Circulation and the transfer of property are the life and
" ſoul of trade, and muſt not be checked in any inſtance. *There is no*
" *reaſon for confining the power of aſſignment to the two inſtruments which*
" *I have mentioned*, and I will ſhew you other caſes in which the court
" have allowed it. 1ſt, In *Fenner v. Meares*, 2 *Bl. rep.* 1269, where
" the defendant, the captain of an *Eaſt-Indiaman*, borrowed £. 1000,
" of *Cox*, and gave two reſpondentia bonds, *and ſigned an indorſement*
" *on the back of them*, acknowledging that in caſe *Cox* choſe to *aſſign*
" the bonds, *he held himſelf bound to pay them to the aſſignees. Cox af-*
" *ſigned them to the plaintiff, who was allowed to recover the amount of them*
" *in an action for money had and received.* De Grey, chief juſtice, in
" diſpoſing of the motion for a new trial, ſaid, " Reſpondentia bonds
" have been found eſſentially neceſſary for carrying on the *India* trade;
" but it would clog theſe ſecurities, and be productive of great in-
" convenience, if they were obliged to remain in the hands of the

" firſt obligee. This contract is therefore deviſed to operate upon " ſubſequent aſſignments, *and amounts to a declaration that, upon ſuch* " *aſſignment, the money which I have borrowed ſhall no longer be the money* " *of A. but of B. his ſubſtitute.* The plaintiff is certainly entitled to " the money in conſcience; and therefore I think entitled alſo at law; " *for the defendant has promiſed to pay any perſon who is entitled to the mo-* " *ney.*" So, in the preſent caſe, I ſay the plaintiffs are in conſcience " entitled to the money, and the defendant has promiſed to pay, or " which is the ſame thing, is bound by law to pay the money to any " perſon who is entitled. *The very nature and foundation of an action* " *for money had and received is that the plaintiff is in conſcience entitled to* " *the money;* and on that ground it has been repeatedly ſaid to be a " bill in equity. We all remember the ſound and manly opinion given " by my Lord Chief Juſtice here, in the beginning of the laſt term, " on a motion made by Mr. *Bearcroft* for a new trial, wherein he ſaid, " *if he found juſtice and honeſty on the ſide of the plaintiff here, he would* " *never turn him round, in order to give him the chance of getting juſtice* " *elſewhere.* 2dly. *Clarke v. Adair, ſittings after Eaſter,* 4. *G.* 3. *De-* " *bray,* an officer, drew a bill on the agent of a regiment, payable " out of the firſt money which ſhould become due to him on account " of arrears, or non-effective money. *Adair* did not accept the bill, " but marked it in his book; and promiſed to pay when effects came " to hand. *Debray* died before the bill was paid; and the admini- " ſtratrix brought an action againſt *Adair* for money had and received. " It was allowed by all parties that this was not a bill within the cuſ- " tom of merchants: But lord Mansfield ſaid it is *an aſſignment for va-* " *luable conſideration, with notice to the agent, and he is bound to pay it.* " He ſaid he remembered a caſe in chancery where an agent under " the like circumſtances had paid the money to the adminiſtrator, and " was decreed, notwithſtanding, to pay to the perſon in whoſe fa- " four the bill was drawn. 3dly. In *Iſrael v. Douglas, C. B. Eaſt.* " 29. *G.* 3. (1 *H. Bl.* 242.) A. being indebted to B. and B. indebted to " C. B. gave an order to A. to pay C. the money due by A. to B. where- " upon C. lent B. a further ſum, and the order was accepted by A. On " the refuſal of A. to comply with the order, it was held that C. might " maintain an action for money had and received againſt him. And " Mr. J. Heath expreſsly ſaid he thought in *mercantile tranſactions of* " *this ſort* ſuch an undertaking may be conſtrued to make a man lia- " ble for money had and received. This opinion was cited with ap- " probation in the houſe of lords in *Gibſon v. Minet.* Laſtly, I come to " the caſe of *Tatlock v. Harris,* (3 *T. R.* 182.) in which *Lord Ke-* " *nyon,* in delivering the judgment of the court ſaid, " *it was an ap-* " *propriation of ſo much money to be paid to the perſon who ſhould become the* " *holder of the bill. We conſider it as an agreement between all the par-*

" *ties to appropriate ſo much property to be carried to the account of the* " *holder of the bill*, and this will ſatisfy the juſtice of the caſe without " infringing any rule of law." All theſe caſes prove that the remedy " ſhall be enlarged, if neceſſary, to attain the juſtice of the caſe; " *and that if the plaintiff has juſtice and conſcience on his ſide, and the de-* " *fendant has notice only, the plaintiff ſhall recover in an action for money* " *had and received.* Let us not be leſs liberal than our predeceſſors, " and we ourſelves have been on former occaſions. Let us recollect, as " *lord chief juſtice Wilmot* ſaid in the caſe I have alluded to, that not " only *boni judicis eſt ampliare juriſdictionem*, but *ampliare juſticiam:* and " that the common law of the land is the birth right of the ſubject, " under which we are bound to adminiſter him juſtice, without ſend- " ing him to his writ of ſubpœna, if he can make that juſtice appear. " The juſtice, equity and good conſcience of the caſe of theſe plain- " tiffs can admit of no queſtion: neither can it be doubted but that " the defendant has got the money which the plaintiffs ought to re- " ceive."

Thus we ſee that the rule, that a *choſe in action* is not aſſignable, has been often ſhaken; that at moſt it amounts only to an objection to the *form of action*, and that courts of law ought to lean againſt an *exception to form*, which does not ſupport the ſubſtantial merits of the caſe. No caſe is recollected in which it has ever prevailed when the inſtrument was made negotiable by the original contract and intention of the parties. This promiſſory note was intended by the parties to be negotiable; it is made payable to order, and ſays on the face of it, " *negotiable at the bank of Alexandria.*" And in the caſes of *More v. Manning*, *Comyns* 311, *Acheſon v. Fountain*, 1 *Str.* 557, and *Edie v. E. India Company*, 2 *Bur.* 1216, it is determined that a bill or note, negotiable in its original creation, remains negotiable in the hands of the indorſee, even if it be not indorſed payable *to order*. If the original contract of the maker was negotiable, the dependant contract of the indorſer muſt be negotiable alſo, for he warrants that the maker ſhall perform his engagement; which is, to pay the money to the holder. The indorſement follows the nature of the original contract, and partakes of its negotiability.

That a choſe in action may be made negotiable or aſſignable in its original creation, by the contract and intention of the parties, independant of the cuſtom of merchants, and of ſtatute law, ſeems not to be a new idea, but is ſtrongly ſupported by the reaſons aſſigned by the judges for their judgment in ſeveral of the reported caſes. It was very early ſettled that if A. deliver money to B. to be paid to C.—C. might maintain an action againſt B. for the money, *Dyer* 21, *(a) pl.* 128. *Gore*

v. Woddye, *Trin.* 28. *H.* 8.—1 *Bulſtrode*, 68. *Flewellin v. Rave. Mich.* 8. *Jac.*—1 *Roll. Abr.* 7. *pl.* 2. *Beckingham and Lambert v. Vaghan*, *Trin.* 14. *Jac.*—1 *Roll. Abr.* 30, 31. *Diſborne v. Denabie*, *Paſch.* 1649. 1 *Brownlow rep.* 82, *and Yelv.* 23. *Wherwood v. Shaw*, 44. *Eliz.*—*Moore*, 854. *Babington v. Lambert*, 14. *Jac.*—*Hardres*, 321. *Bell v. Chapman*, 14. 15. *Car.* 2.—1 *Vent.* 152. *Brown v. London*, 23. *Car.* 2. 1 *Vent.* 119. *Hornſey v. Dimocke*, 23. *Car.* 2.—2 *Vent.* 310. *Cramlington v. Evans*, 1 *W. and M.* In theſe caſes it will be found that no conſideration paſſed from C. to B. nor any promiſe from B. to C. and yet an action was held to be maintainable by C. againſt B. upon the contract made between A. and B. So that to ſupport an action for money had and received it is not neceſſary that a conſideration ſhould paſs from the plaintiff to the defendant, nor any promiſe from the defendant to the plaintiff; and this principle will be found to run through all the caſes for money had and received.

In the caſe of *Oble v. Dittlesfield*, 23. *Car.* 2. *B. R.* 1 *Vent.* 154, the principle is carried ſtill farther. The money in this caſe was not paid by A. to B. purpoſely to pay over to C. as in the former caſes, but B. being *indebted* to A. and A. to C.—A. appointed C. to receive the money from B. in ſatisfaction of the debt due to C. by A. which he, (A.) ſignifying to B. (the defendant,) he, in conſideration of the premiſes, and that the plaintiff (C.) would forbear him a quarter of year, promiſed that he would then pay him. It was moved in arreſt of judgment that there was no ſufficient conſideration; *for the defendant was no party to this agreement, and was not liable to the plaintiff*, and therefore the plaintiff's forbearance was no benefit to the defendant; *ſed non allocatur*, for *Hale* ſaid, "When aſſumpſits firſt grew into practice, "they uſed to ſet out the matter at large, viz. in ſuch a caſe "as this, *Quod mutuo agreatum fuit inter eos*, &c. *and they ſhould be diſ-* "*charged one againſt the other.* But ſince, *it hath been the way to declare* "*more conciſely.* And upon the whole matter here it appears *that the* "*defendant agreed to the transferring of the debt to the plaintiff*; and that "it was agreed he ſhould be diſcharged againſt A."

Here then is an aſſignment of a debt, and held to be valid *becauſe the debtor agreed to it.* This was a *precedent* debt and was clearly a choſe in action; and if ſuch a debt may be aſſigned by a *ſubſequent* agreement of the debtor, *a fortiori* may a debt be aſſigned which the debtor expreſsly makes aſſignable at the *very moment of its creation.* Its negotiability then becomes a part of the *nature* of the contract; it is a quality belonging to the debt itſelf, and enters into its very eſſence.

Another principle which ſeems to be well eſtabliſhed is, *that he for whoſe benefit a promiſe is made*, may maintain an action upon it, al-

though no conſideration paſs from him to the defendant, nor any promiſe from the defendant directly to the plaintiff. This propoſition is ſupported not only by the authorities already cited, but by the caſe of *Dutton v. Poole*, 30. *Car.* 2. *T. Jones*, 102.—1 *Vent.* 318. 332.—1 *Freem.* 471.—*T. Ray.* 302.—2 *Lev.* 210.—3 *Keb.* 786, 814, 830, 836.—*Styles prac. reg.* 59.—*Savil*, 24. *Sadler v. Paine.*—1 *Roll. abr.* 32. *pl.* 13. *and Styles*, 296. *Starkey v. Mill, Mich.* 1651. *Hetley* 176. *Hadves v. Levit. Moore*, 550. *Hawes v. Levitt. Cro. El.* 652. *S. C. Cro. El.* 849. 881. *Rippon v. Norton.*—1 *Vent.* 6, 7. *Bourne v. Maſon.* 20 *Car.* 2.—*Latch.* 206. *Legat's caſe*, 3 *Car.*—*Cowper*, 443. *Martyn v. Hind.*—1 *Bos. and Pul.* 101. *Company of Felt-makers v. Davis*, 38. *G.* 3. *C. B.*

If A. lends B. 100 dollars, for which B. gives A. his promiſſory note payable to *A. or order*, the money thus delivered by A. to B. is delivered to be paid over by B. to a third perſon upon a contingency, viz. that A. ſhall, by indorſement on the note, name the perſon to whom it is to be paid. This differs in nothing from the caſe of *Core and Woddye*, and the other caſes before cited, except that the third perſon is not named at the time of the delivery of the money to B.—But the caſe of *Oble v. Dittlesfield* ſhows, that the naming of a third perſon may be as well done after the debt is created, as at the time of its creation, provided the debtor agree to the transfer. Theſe principles certainly go far to prove that a contract *for the payment of money*, may be made negotiable in its nature by the conſent of parties, on principles of common law. It muſt be an obſtinate principle of law, indeed, and juſtified by the ſtrongeſt reaſons, that can prevent free agents from voluntarily entering into a contract not injurious to themſelves, or others. Every contract is to be conſtrued according to the intention of the parties.

A contract conſtitutes the law between the contracting parties, unleſs it be contrary to ſome poſitive law, or prejudicial to ſociety.

No good reaſon can be given why a man ſhould not be permitted to make his contract negotiable.

In the caſe of *Hodges v. Steward*, 1 *Salk.* 125. 3, *W. and M.* it is ſaid, "a difference was taken between a bill payable to I. S. *or bearer*, "and I. S. *or order; for a bill payable to I. S. or bearer*, is not aſſignable "*by the contract*, ſo as to enable the indorſee to bring an action if the "drawer refuſe to pay, *becauſe there is no ſuch authority given to the par-* "*ty by the firſt contract*; and the effect of it is only to diſcharge the "drawee if he pays it to the bearer, though he comes to it by trover,

" theft, or otherwiſe. *But when the bill is payable to I. S. or order,* " *there an expreſs power is given to the party to aſſign, and the indorſee* " *may maintain an action.*"

Here it is held that the words, *or order*, make the contract negotiable.

In *Hill v. Lewis*, 1 *Salk.* 132, 5 *W. and M.* Lord Holt ſaid, " for " the words *or order*" (this was in a promiſſory note before the ſtatute of Anne) " *give authority* to the plaintiff *to aſſign it by indorſement; and* " *'tis an agreement by the firſt drawer that he would anſwer it to the aſ-* " *ſignee.*"

In *Jordan v. Barloe*, 12 *W.* 3. 3 *Salk.* 67, it was " ruled that " where a *bill*" (probably meaning a promiſſory note) " is drawn, pay- " able to W. R. *or order*, 'tis within the cuſtom of merchants, and " ſuch a bill may be negotiated and aſſigned by cuſtom, *and the contract* " *of the parties*, and an action may be grounded on it, though 'tis no " ſpecialty."

In *Carter v. Palmer*, 12 *Mod.* 380. 12 *W.* 3. upon a promiſſory note payable to bearer, " all ſeemed to agree, if it were made payable " to him *or order*, the defendant *by that form had made it negotiable*, and " by conſequence he would be liable to the action of aſſignee in his " own name."

In *Clerk v. Martin*, 1 *Lord Ray.* 757, 1 *Anne*, Shower, for the plaintiff, argued in the ſame manner, uſing nearly lord Holt's own expreſſions in the caſes juſt cited; yet his lordſhip was " *totis viribus*" againſt him. Shower contended, " that this note, being payable to " the plaintiff *or his order*, was a bill of exchange, *inaſmuch* as, by *its* " *nature*, it was negotiable; and that diſtinguiſhes it from a note " payable to I. S. *or bearer*, which he *admitted* was not a bill of ex- " change, becauſe it is not aſſignable nor *indorſable* by the *intent of the* " *ſubſcriber*, and conſequently not negotiable, and therefore it cannot be " a bill of exchange, becauſe it is incident to the nature of a bill of " exchange to be negotiable: but here *this* bill *is* negotiable, for if it " had been indorſed payable to I. N., I. N. might have brought an " action upon it, as upon a bill of exchange. Why then ſhould it " not be before ſuch indorſement a bill of exchange to the plaintiff " himſelf; *ſince the defendant by his ſubſcription has ſhewn his intent to be* " *liable* to the payment of this money to the plaintiff *or his order*; and " ſince he hath thereby *agreed that it ſhall be aſſignable over*, which " is by conſequence that it ſhall be a bill of exchange; and to make

" ſuch a note a bill of exchange can be no wrong to the defendant, " becauſe he, *by ſigning the note*, has made himſelf to that purpoſe a " merchant, and *has given his conſent that his note ſhall be negotiated*, and " has thereby ſubjected himſelf to the law of merchants." Strong as this reaſoning is, it was not ſufficient to convince lord Holt. A ſimilar argument *by Brotherick* produced no greater effect upon his lordſhip in the caſe of *Buller v. Crips*, 6 *Mod.* 29, 2 *Anne*, where it was ſaid that " he that gave this note, did by the *tenor* thereof make it " aſſignable or negotiable by the words *or order*, *which amounts to a* " *promiſe or undertaking, to pay it to any whom he ſhould appoint, and the* " *indorſement is an appointment to the plaintiff.*"

But although his lordſhip would not acknowledge the weight of his own arguments, they have been duly appreciated by ſubſequent judges.

In the caſe of *Edie et al. v. E. India company*, *Trin.* 1. *G.* 3. 2 *Bur.* 1216, it was contended for the plaintiffs, " that a *promiſſory* " *note* or bill of exchange, originally made payable to one, *or order*, is, " *in its own nature*, aſſignable; and the aſſignee has the *whole intereſt* " in it, and may aſſign it as he pleaſes; and any reſtriction or con- " finement of his aſſignment of it, is contrary to the *nature of the thing*, " and *therefore* void." And the counſel for the defendants admitted that ſuch a bill of exchange " was *negotiable* in its *nature*." But they contended that an indorſement to a man, without the words, *or order*, was no more than a naked authority to receive the money.

Lord Mansfield ſaid, " a draft drawn upon one perſon, directing " him to pay money to another *or order*, is, in its *original creation*, not " an authority, but a bill of exchange, and is *negotiable*."

Mr. Juſtice Denniſon. " Where a bill is originally made payable to " A. *or order*, it is *of courſe*, and in *its very eſſence*, *negotiable*, from hand " to hand. An *inland* bill of exchange is aſſignable *in its nature*."— " *Foreign* bills are equally ſo *by the law of merchants*." " This is " matter of *law*: And the law is clearly and fully fixed. There is no " inſtance of a *reſtrictive limitation*, where a bill is *originally* made pay- " able to a man *or order*." " In general the indorſement follows the " nature of the thing indorſed; and is equally negotiable." " The " law has determined that the bill is negotiable *in itſelf*."

Mr. Juſtice Wilmot. "This *original contract* is " to pay to ſuch " perſon or perſons as the payee or his aſſignees, or their aſſignees ſhall " direct," and there is the *ſame privity*, (ſee 1 *W. Bl. rep.* 299, *S. C.*) " between the *drawer* and the *laſt* aſſignee, as the *firſt*." " The firſt

" aſſigns over that *choſe in action*, which *in its nature*, and by the expreſs " permiſſion of law, is aſſignable, with the ſame privileges and advan- " tages, that it had when he received it." " The indorſement is part " of the *original contract*, and is incidental and appurtenant to it, *in the* " *nature of it*, and muſt be underſtood and interpreted in the ſame man- " ner as the bill was drawn. And the indorſee holds in the ſame manner, " and with the ſame privileges, qualities and advantages as the origi- " nal payee held it; that is as an *aſſignable*, *negotiable* note, which he " may indorſe over to another, and that other to a third, and ſo on at " pleaſure." " And there is no difference whether the determinations " be on promiſſory notes or on bills of exchange: it is juſt the ſame " thing; becauſe it is to be governed by the ſame rule." " The *con-* " *venience and courſe of trade* is to be attended to: the intention is to " be regarded, *not the form*."

The caſe of *Grant v. Vaughan*, 3 *Bur.* 1516, was by the *bearer* againſt the drawer of a check in this form, " *Pay ſhip Fortune or bear-* " *er* £.70." This check was delivered to one Bickneil, the ſhip's huſband, who loſt it. It came honeſtly to the hands of the plaintiff in the way of trade. The declaration was upon a bill of exchange, and for money had and received. On the part of the defendant it was contended " that this was not a *negotiable note*, but only an authority " to receive ſo much caſh. That it cannot be conſidered as a *negotiable* " *bill of exchange*; for it was not accepted, nor indorſed, nor was it " proteſtable, nor entitled to any day of grace."

" The plaintiffs counſel inſiſted that this bill or note was *in its na-* " *ture negotiable*; that ſuch bills were in fact *always* conſidered as *ne-* " *gotiable*, and actually negotiated, and commonly circulated *as caſh*. " And if they be, from the *nature of the contract*, negotiable, the " finding of the jury can not alter the law." " They object that it is " not a bill of exchange, becauſe it is not *accepted*, nor can be *proteſt-* " *ed*, nor is entitled to a day of grace, nor is *indorſable*. But it is a " *negotiable inſtrument*. It is not neceſſary that it ſhould be *a bill of* " *exchange*; an *inland* bill of exchange *is not like* a *foreign* bill of ex- " change; for the former could not have been *proteſted* before this " act of parliament, nor needs to be ſo ſince the act; whereas a fo- " reign one always abſolutely required it." " Whoever gives a note " payable to *bearer*, *expreſsly promiſes* to pay it to every fair bearer; " however, an *implied* promiſe would ſuffice for our purpoſe."

This reaſoning is evidently grounded upon *general principles* of the conſtruction of contracts; for the counſel then go on to reaſon from the ſtatute of Anne. " But," ſay the counſel, " they were *negotiable*

" *before the act was made.*" " And there is *no case at all* where it has " been determined that a note of this kind can not be given in evi- " dence upon a general *indebitatus assumpsit for money had and received.* " It is enough for the plaintiff that this note was *negotiable.* The " bearer must prevail against the drawer in *some* mode of action." " But there can be no sort of doubt on the latter count;" (money had and received) " as the note is *evidence* of the *plaintiff's* money " being in the hands of the person who *gave* it. Whether, therefore, " this case be considered upon *principles of law, prior* to the act of 3 " and 4 Anne, or *upon that act*, or upon what has passed since the act, " it will appear that the plaintiff ought to recover upon *this action.*"

Lord Mansfield went into a minute examination of the cases of *Nicholson and Sedgwick, Horton and Coggs*, and *Hodges v. Steward*, and said that upon *general principles*, they were not agreeable to law. " It " is a question of *law* whether a bill or note be *negotiable* or not. It " appears in the books that these *notes* are *by law negotiable*; and the " plaintiff's maintaining his action or not maintaining it, depends up- " on the question, *whether such a note is negotiable or not.*" Speaking of the decisions of lord Holt before the statute of Anne, he says, " The " objection was to bringing an action *upon* the note *itself, as upon a* " *specialty*; but I do not find it any where disputed, that an action upon " an *indebitatus assumpsit* generally, *for money lent*, might be brought " on a note payable to one *or order.*" " But upon the *second* count, " the present case is *quite clear, beyond all dispute*: for *undoubtedly*, an " action for *money had and received to the plaintiff's use*, may be brought " by the *bonâ fide bearer* of a note made payable to bearer. *There is* " *no case to the contrary.* It was *certainly money received for the use of the* " *original advancer of it: and if so, it is for the use of the person who* " *has the note as bearer.*"

Mr. Justice Wilmot. " Probably the jury took upon themselves to " consider, whether such bills or notes as this is, were *in their own* " *nature negotiable.*" But this is a point of *law*; and by law they *are* " negotiable." And again he says, " But this is a *negotiable note*; and " the action may be brought in the name of the *bearer. Bearer* is " *descriptio personæ*; and a person may take by *that* description, as " well as by any other. *In the nature of the contract* there is no im- " propriety in his doing so. It is a *contract* to pay *the bearer, or to the* " *person to whom he shall deliver it*, (whether it be a note, or a bill of " exchange:) and it is repugnant to the *contract*, that the drawer " should object, that the bearer has no right to demand payment from " him."

" It is agreeable to common ſenſe and reaſon that if a man comes by " ſuch a note or bill fairly, and on a valuable conſideration, he ſhould " have a right to maintain an action upon it as *bearer*."

" The reaſons given in the caſes that are *oppoſite* to *this* (Hinton's " caſe, 2 Shower 235) are altogether unſatisfactory. Thoſe deter- " minations ſtrike at this great branch of commerce; if they were to " prevail they would put an end to all this ſpecies of it."

" Even *before* the ſtatute of 3 and 4 Anne, *lord chief juſtice Holt* " himſelf thought, that an *indebitatus aſſumpſit* for money *lent*, or for " money *had and received*, might be maintained upon ſuch a note: and " if it was a queſtion *antecedent* to that act, I ſhould ſtand by that " firſt caſe of *Hinton*, rather than the latter ones which differ from it. " But that *ſtatute* was made expreſsly and on purpoſe to *obviate theſe* " *doubts*. However, if you *would* ſuppoſe it made to introduce a *new* " *law, and that ſuch an action could not be maintained before the making* " *of it*, yet," &c.

" This now under conſideration is a *negotiable inſtrument*, which I " think partakes *more* of the nature of a *promiſſory note*, than of a bill " of exchange. But taking it as a bill of exchange. A bill of exchange " is a *promiſe* to pay the money if the drawee does not pay it."

Mr. Juſtice Yates, ſaid, " Nothing can be more peculiarly nego- " tiable than a draught or bill payable to bearer; which is, *in its na-* " *ture*, payable from hand to hand, *toties quoties*.

" It *had been doubted*, it is true, whether that *ſpecies of action*, where " the plaintiff declares *upon the note itſelf*, as upon a *ſpecialty*, was pro- " per; *but here is a count for money had and received to the plaintiff's uſe.* " The queſtion whether he can bring *this action*, depends upon its be- " ing *aſſignable* or not. The *original advancer of the money* manifeſtly " appears to have had the money in the hands of the drawer; and " therefore *he* was certainly entitled to bring *this* action, and if he " *tranſfers* his property to another perſon, that other perſon may " maintain the like action." " Giving ſuch a bill is, as it were, *an* " *aſſignment of ſo much property*, which becomes money had and receiv- " ed *to the uſe of the holder of the bill.*" *(See alſo* 3 *T. R.* 182. *Tatlock v. Harris.)*

It will be obſerved that the whole reaſoning of this caſe is grounded, not on the cuſtom of merchants, but upon the check being a *negotiable*

inſtrument, in its nature; and that it applies as ſtrongly to a promiſſory note before the ſtatute of Anne as to a bill of exchange.

A practical expoſition of theſe principles is to be found in the caſe of *Fenner v. Meares*, 2 *W. Bl.* 1269, which was an action for money had and received brought by the *aſſignee* of a *reſpondentia bond*, againſt the *obligor*. The bond was payable to one *Cox*. The defendant, in the preſence of Cox, ſigned an indorſement on the bond, by which he acknowledged himſelf "bound to pay, to ſuch aſſignee thereof as "ſhould be duly appointed by him the ſaid James Cox, the whole of "the principal and intereſt of the within bond, agreeably to the te-"nor thereof, without any deduction or abatement whatſoever."

It was objected for the defendant, that no general *indebitatus aſſumpſit* will lie where the debt ariſes on a ſpecialty, and if it did, yet the plaintiff ought to have recovered no more than he paid to the aſſignor with common legal intereſt.

For the plaintiff it was ſaid, that the objection was only to the *form* of the action; and the court would not grant a new trial contrary to equity. "But the form of the action is well conceived. The in-"dorſement is an *aſſumpſit* by ſingle contract, as much as if made on "a ſeparate paper *after* the aſſignment had. *Meares promiſes to pay any* "*one to whom Cox ſhould aſſign;* beſides the reiterated promiſe made to "Evans after Meares' return." "As for the damages and intereſt, "thoſe muſt purſue the terms of the *original contract which is now* "*transferred to Fenner.*

Blackſtone, juſtice. "As this is entirely a new queſtion, and I cannot, "upon ſo ſhort a conſideration, foreſee all the conſequences attending "it, I ſhall avoid giving any deciſive opinion upon it. I cannot, for in-"ſtance, upon ſo tranſient a view, diſcern what effect might be de-"rived to the aſſets of a perſon deceaſed, by thus turning a ſpecialty "debt into a ſimple contract. And from this caution, *rather than* "*from any great doubt attending this particular caſe*, I chuſe to deter-"mine it upon plainer and more indiſputable grounds, ariſing from "the evidence before us. The promiſe made by Meares to Evans" (a meſſenger ſent by the plaintiff to the defendant to give him notice of the aſſignment and to demand the money) "upon his return from In-"dia, is clearly an aſſumpſit to Fenner. It would be a ſufficient pro-"miſe to avoid the ſtatute of limitations. And the aſſignment and "other tranſactions are fully ſufficient as a conſideration, to make "that aſſumpſit binding. Upon that ground it is therefore clear that *a* "general *indebitatus aſſumpſit* will lie. 2d. As to the quantum of da-

" mages, I think it perfectly right. Whatever would have been due " to *Cox, is, by the assignment, transferred to Fenner.*

Nares, justice. " I think this is *a particular promise to the assignee,* " *whenever any such should be.* When therefore the *assignment* is executed, " the money is demandable by virtue of that *assumpsit*; and of conse- " quence this action well lies. I agree with my brother Blackstone, " in respect to the quantum of damages."

De Grey, chief justice. " At the trial I gave an opinion that *in point* " *of law* this action was maintainable, and I have seen no reason to " change it. Were I now silent it might be thought I had. But I am " still satisfied that the action will lie, *abstracted of the particular evidence* " on which my brother Blackstone has founded his opinion. Respon- " dentia bonds have been found essentially necessary for carrying on " the *Indian* trade. But it would clog these securities, and be pro- " ductive of great inconvenience, if they were obliged to remain in " the hands of the first obligee. This contract is therefore devised, " to operate upon subsequent assignments; *and amounts to a declara-* " *tion that, upon such assignment the money, which I have so borrowed,* " *shall no longer be the money of A. but of B. his substitute. The plaintiff* " *is certainly entitled to the money in conscience, and therefore, I think, enti-* " *tled also at law; for the defendant has promised to pay any person that* " *shall be entitled to the money.*"

It will be observed that there is no difference between the ground of Blackstone's opinion, and that of the other judges, excepting in this, that the former chose to ground his opinion upon the *verbal* promise made *after* the assignment, and the others rested it upon the written promise on the back of the bond, made *before* the assignment; but all must have agreed that the debt was *assignable*, with the assent of the debtor.

The case of *Innes v. Dunlop*, 8 *T. R.* 595, was by the *assignee* of a *Scotch bond*, against the obligor. There were two special counts, and four money counts. To the two special counts the defendant demurred.

" *Onslow*, sergeant, in support of the demurrer, objected that the " plaintiff, who was merely the assignee of a *chose in action*, could not " sue in his own name, but should have brought the action in the " name of *Hunter and co.* the obligees in the bond. But,

" *The Court*, after observing that this was not an action on the bond, " said that they were clearly of opinion that the *assignment of the bond*

" *to the plaintiff* was a conſideration for the *aſſumpſit by the defendant*, " in the ſame manner as actions of aſſumpſit are maintained, in every " day's practice, upon foreign judgments; and the defendant, by " demurring, had confeſſed both the conſideration and the aſſumpſit. " And therefore they gave *judgment for the plaintiff*." In a note to this caſe, the reporter refers to the caſe of *Fenner and Meares*, 2 *Bl. rep.* 1269, before cited. Although the declaration ſtates, that " by " reaſon of the premiſes," (viz the making of the bond and the aſſignment to the plaintiff) " *and according to the law of Scotland*, the " defendant became, and was indebted to the plaintiff," and being ſo " indebted, in conſideration thereof promiſed to pay," &c. yet the law of Scotland does not ſeem to be the ground of the judgment, but the court rely entirely upon *the aſſignment* of the bond being a ſufficient conſideration for the aſſumpſit, agreeably to judge Blackſtone's opinion in *Fenner and Meares*.

The caſe of *Reed v. Ingraham*, 3 *Dall.* 505, is a ſtrong caſe in ſupport of the principle that a contract may be made negotiable *by the intention of the parties*. It was an action in the ſupreme court of Pennſylvania, brought *by the aſſignee of a ſtock contract* to recover the amount of the difference, due on the contract, which was expreſſed in theſe words, " On the 18th of April, 1792, I promiſe to receive " from *Joſeph Boggs, or order*, ten thouſand dollars, ſix per cents. and " pay him for the ſame at the rate of 23 ſhillings and 7 pence $\frac{3}{7}$ per " pound."

(Signed) " *Francis Ingraham*."

The aſſignment was indorſed in theſe words,

" I do hereby authorize *William Reed, or his order*, to tender or de- " liver the ſtock within mentioned, and the ſaid *William Reed, or his* " *order*, to receive for the ſame, the ſums of money due and payable " therefor, at the rates within expreſſed."

(Signed) " *Joſeph Boggs*."

The defendant had notice of the aſſignment before the day of payment, and the ſtock was duly tendered. The defendant contended that the *contract was not negotiable*, but that if it was, he had a right of *offſet* againſt Boggs.

" *By the Court.* The action is well brought, as it is founded on a " contract in which the defendant *expreſsly ſtipulates* that he will re- " ceive the ſtock from, and pay the price to *Joſeph Boggs, or his order.* " On general principles of law, ſtock contracts can not be regarded

" as negotiable; *but a contractor may certainly make himself liable as if* " *they were so;* and the maxim, *modus et conventio vincunt leges*, ap- " plies forceably to the case.

" With respect to the alleged inconvenience, that in the present " form of action the defendant is debarred from the benefit of a *set-* " *off*, it would be enough to answer, *that as this is the consequence of his* " *own act and agreement*, he has no reasonable cause of complaint. " But it is also obvious that when the contract was assigned, and the " present action was instituted, there did not exist between him and " *Boggs*, any mutual debt, or demand, which could be the subject of " defalcation upon the principles of the act of assembly."

" Verdict for the *plaintiff*."

Upon a policy of insurance, the person interested is allowed to bring an action in his own name, although not mentioned in the policy. 1 *Shower*, 156. And a bill of lading has always been held to be assignable, and the assignee may bring an action in his own name against the master or owners, for the goods. 1 *Lord Ray.* 271, *Evans v. Martlett.* 4 *Bur.* 2051, *Wright v. Campbell.* 1 *T. R.* 205, *Caldwell v. Ball.* 1 *T. R.* 745, *Hibberts v. Carter.* In these cases it was held that the assignment of the bill of lading alters the property. So in the case of *Walker v. Walker*, 5 *Mod.* 13, lord Holt held that the cast of a die altered the property of the money in the hands of a stake-holder. *Kyd* 22, says, that notes payable *to order* have *always* " been held to be negotiable."

To these authorities may be added that of the case of *Gerard v. La Coste et al.* 1 *Dallas* 194.

From all these cases it seems to be a maintainable proposition that a man may make his debt negotiable, notwithstanding the principle that a chose in action cannot be assigned. Indeed that principle seems to have been introduced for the purpose of preventing the creditor from transferring his right of action contrary to the will of the debtor, but was not intended to apply to those cases where the debtor had expressly authorised his creditor to assign it.

4. The fourth point is that no *indebitatus assumpsit* will lie without *privity*.

This idea seems to have been founded upon the exploded doctrine, that *indebitatus assumpsit* will lie only in cases where *debt* will lie. But

even admitting the latter propoſition to be true, yet it will not apply; for in the caſe of *Core and Woddye* (and the other caſes cited which were dependant upon it) it was held that if a man receives money to my uſe I may maintain an action of *debt* againſt him for it.

Plowden, in the caſe of *Platt v. Locke*, *Paſch.* 4, *Ed.* 6, which was an action of debt againſt the ſheriff for an eſcape, *fol.* 36, *(a. and b.)* ſays, "And ſo it appears that the action upon the matter was main-"tainable, although there was not any contract between them; for "upon a *liberate* delivered to the clerk of the *Hanaper*, who has aſ-"ſets in his hands, an action of *debt* will lie againſt him, as appears "by 1 H. 7, *and yet there is not any contract between them*, nor any "*privity in words*; and *ſo in many like caſes*."

In the caſe of *Wherwood v. Shaw*, 44 *Eliz.* 1 *Brownlow* 82, it was "adjudged that *although no contract was between the parties*, yet when "either money *or goods* are delivered, upon conſideration, *to the uſe* "*of A*; *A. may have an action of debt.* And of that opinion was Mon-"tague, 28 *H.* 8, *in Core and Woddye's caſe*; and alſo there is a prece-"dent of ſuch actions in the book of Entries." *Yelv.* 23, *S. C.*

In 1 *Salk.* 27, *Jacob v. Allen*, an executor brought an action for money had and received againſt an attorney of an adminiſtrator, who had been appointed before it was known that there was a will, and it was held to lie, *although the attorney had paid it over to the adminiſtrator before action brought.* Here certainly was no privity of contract.

In 2 *W. Bl.* 830, *Hitchen v. Campbell*, it is ſaid by the court that, "The ſame principle which ſupports this action againſt one who re-"ceives money from the bankrupt himſelf, will ſupport it againſt "another who receives it *under* the bankrupt. In both caſes it is the "property of the aſſignees. *And though while this action was in its in-"fancy (2 Jones* 126, 2 *Lev.* 245.*) the courts endeavored to find tech-"nical arguments to ſupport it, as by a notion of* PRIVITY, *&c. yet that "principle is too narrow* to ſupport theſe actions, in general, to the "extent to which they are admitted." In the ſame caſe as reported in "3 *Wilſon* 304, it is ſaid by the court, "Whoever has received the "money for the bankrupt's goods is ſuppoſed in juſtice to have re-"ceived the ſame for the uſe of the aſſignees, in whom the property "of thoſe goods was, by law, veſted; and to have promiſed to pay "the ſame to the aſſignees; *there is a ſuppoſed privity of contract be-"tween the perſons whoſe money it lawfully is, and the perſon who has got "or received it.*"

The ſame ideas are ſuggeſted by lord Mansfield in the caſe of *Hawkes v. Saunders*, *Cowp.* 290. Indeed among the innumerable caſes in which the action for money had and received is the proper remedy, ſcarcely one can be found in which there exiſts any privity of contract between the parties.

It lies to recover fees received by the defendant claiming a right to the plaintiff's office; as in the caſe of *Howard v. Wood*, 2 *Jones*, 126. 1 *Freem.* 473, 478, where the action was brought to try the plaintiff's title to the office of *Steward of a Court Baron*. "It was "objected for the defendant, that *this* action did not lie, but only a "ſpecial action on the caſe; and that this action is not only improper "*but contrary to the truth of the caſe*; for the plaintiff declares upon "*aſſumpſit* for money received by the defendant *to the uſe of the plaintiff*, "and the jury find that the defendant received the money to *his own* "uſe, claiming the office of ſteward in his *own right*, and the money "as fees incident to the office, which he had exerciſed *contrary to the* "*will of the plaintiff*, and not otherwiſe due than by the exerciſe of "the office. That this money was incident to the *tort* done by the "defendant in the exerciſe of the office, and where a receipt depends "merely on a *tort*, there can be *no contract, or privity, and without theſe* "*no debt*, and by conſequence *indebitatus aſſumpſit* does not lie." "But it was reſolved *by the whole court* that the action lay; for this is "an expeditious remedy to facilitate the recovery of *juſt rights*; and "this manner of action has now prevailed *for a long time*; and the "point had been ruled often by the judges in their circuits, and "actions frequently brought in this manner; and lately upon ſolemn "argument in the court of exchequer, in the caſe of *Dr. Aris*, "2 *Mod.* 260, who brought ſuch action for the profits of the office "of comptroller in the port of Exeter, it was reſolved by the lord "chief Baron and all the court that the action lay." Here the ſame exception was expreſsly over-ruled, which is now ſet up in the preſent action; and it has been uniformly over-ruled ever ſince. The ſame points were made and overruled in the caſe of *Dr. Aris* above cited; and the court ſaid that *indebitatus aſſumpſit* will lie *for rent received by one who pretends a title*, and cited 4 *H.* 7, 6, *(b.) and Moor* 458. This was alſo agreed in 12 *Mod.* 324. *Huſſey v. Fiddall.*

"In aſſumpſit for money received to the plaintiff's uſe, the queſ- "tion at the trial was, *Who was the yeoman of the black rod.*" 12 *Mod.* 607. It lies to try the title to a curacy, 3 *Wil.* 355. So for money extorted by dureſs of goods, 2 *Str.* 915, *Aſtley v. Reynolds*, and 4 *T. R.* 485, *Irving v. Wilſon.* And for money paid under an order of a court not having competent authority, 2 *Ld. Ray.* 742,

Newdigate v. Davy. For a *part* of a ſum of money paid, and the *whole* ſum afterwards recovered by judgment, 1 *Vern.* 176, *Barbone v. Brent.* By a ſoldier againſt his captain for the value of a horſe loſt in a ſtorm, 2 *Ld. Ray.* 1007. *Norris v. Napper.* By a woman againſt a man who married her, having a former wife living, for rents of the plaintiff's lands received by the man, 11 *Mod.* 146, *Aſher v. Wallis.* Againſt a ſheriff for money levied on a *fi. fa. Comb.* 430, 447, 1 *Salk.* 22. 6 *Mod.* 161. For the price of goods taken in execution, and ſold under a warrant of diſtreſs upon a conviction, the conviction having been quaſhed. *Feltham v. Terry*, cited in *Lindon v. Hooper*, *Cowp.* 419. So it lies againſt a ſtake-holder on the determination of a wager, 10 *Mod.* 315, *Temple v. Welds.* For money paid to inſure lottery tickets, ſuch inſurance being contrary to law. *Cowp.* 793, *Browning v. Morris.* For a forfeiture under a bye-law of the corporation of barber-ſurgeons in London, 2 *Lev.* 252. So it lies in *diſaffirmance of the contract*, for the purchaſe money paid for a thing not delivered, 1 *Str.* 407, *Anon.* For money paid by miſtake, *Cowp.* 567, *Buller v. Harriſon.* *Doug*, 637, (615) *Ancher v. Bank of England.* Againſt commiſſioners of bankrupt, for a dividend, *Doug.* 408, *Brown v. Bullen.* Againſt the principal, if the money be paid over by the agent. 1 *Str.* 480, *Cary v. Webſter.* 4 *Bur.* 1984, *Sadler v. Evans.* In the caſes of a fictitious payee of a bill of exchange it was admitted there was no *privity*, and yet the plaintiffs recovered on the count for money had and received, 1 *H. Bl.* 313, *Collins v Emmit.* 3 *T. R.* 177, *Tatlock v. Harris.* 3 *T. R.* 182, *Vere v. Lewis.* 1 *H. Bl.* 586, *Gibſon v. Minet.* In the following caſes there was no privity of contract, yet the plaintiff had judgment. *Styles*, 296. *Starkey v. Mill*, 1 *Vent* 119, *Hornſey v. Dimocke.* 1 *Bur.* 374, *Harris v. Huntback.* 2 *Bur.* 1005, *Moſes v. Macferlan.* 3 *Bur.* 1516, *Grant v. Vaughan.* *Cowp.* 199, *Clarke v. Shee and Johnſon.* 2 *W. Bl.* 827, *Hitchen v. Campbell.* 3 *Wilſon* 308, *S. C.* Theſe caſes clearly ſhow that the *want of privity* is no objection to the action of *indebitatus aſſumpſit for money had and received.* If then the want of privity is no bar, what is there to prevent the plaintiff from recovering againſt the defendant? Is it that he is not in juſtice entitled to the money? Or has the defendant a right to retain it? It is admitted that the plaintiff may look to the intermediate indorſer, and that *he* may recover from the defendant. The objection then is that the defendant is not liable to the preſent plaintiff, but to the intermediate indorſer, who alone is liable to the plaintiff. But the plaintiff may ſue in the name of the intermediate indorſer, "for," as *lord Holt* ſays in *Buller v. Crips*, "the indorſement amounts *at leaſt* to an agreement "that the indorſee ſhould ſue for the money in the name of the in-"dorſer and receive it to his own uſe;" and this court will prevent

the intermediate indorſer from releaſing the action, and from interfering in any other manner to fruſtrate the plaintiff's ſuit. Beſides, a recovery and ſatisfaction in the preſent action will be a bar to any action which the intermediate indorſer may bring againſt the preſent defendants on the ſame note. Complete juſtice is done between both parties in the ſhorteſt, leaſt expenſive, and leaſt oppreſſive manner; and that circuity of action, which the "*law abhors*," is avoided. If the plaintiff recover againſt the intermediate indorſer, and *he* againſt the defendant, the judgment will come down upon the defendant charged with the heavy expenſes of two ſuits inſtead of one. The plaintiff will be turned round upon a mere point of form, and perhaps may loſe the debt altogether by the inſolvency of the intermediate indorſer. If the indorſements are in blank the plaintiff may ſtrike out the intermediate indorſements and declare as the immediate indorſee of the firſt indorſer. *Evans on bills* 15, 1 *Eſp. Rep.* 180, *Smith v. Clark*, for a blank indorſement authorizes the holder to fill it up with what he pleaſes, conſiſtent with the nature and tenor of the inſtrument. So that if privity is neceſſary, it is in the power of the plaintiff to raiſe it. But the caſes before cited ſhow that privity is not neceſſary to ſupport the action for money had and received; and from the nature of the thing it can not be neceſſary in any caſe where the inſtrument is negotiable, whether it be made ſo by the cuſtom of merchants, by poſitive ſtatute, *or by the contract of the parties.*

5. The fifth propoſition is that a promiſe in writing, without a conſideration expreſſed, is *nudum pactum.*

This doctrine of *nudum pactum* ſeems not to be well ſettled, although much has been ſaid upon the ſubject.

It was conſiderably diſcuſſed in the caſe of *Pillan v. Van Mierop*, 3 *Bur.* 1663, but as there were other principles in that caſe, it was not neceſſary to decide abſolutely upon this point. Yet the whole court ſeemed ſtrongly inclined to the opinion that the rule, *ex nudo pacto non oritur actio*, did not apply to a promiſe in *writing*. Lord Mansfield ſaid, "A nudum pactum does not exiſt in the uſage and law of "merchants.

"I take it, that the *ancient* notion about want of conſideration was "for the ſake of *evidence* only; for when it is reduced to *writing*, as "in covenants, ſpecialties, bonds, &c. there was no objection to the "want of conſideration. *And the ſtatute of frauds proceeded upon the "ſame principle.* In commercial caſes amongſt merchants, the want "of conſideration is *not* an objection."

Mr. juſtice Wilmot. "I can find none of thoſe caſes that go upon "its being *nudum pactum*, that are in *writing*; they are all upon *parol*. "I have traced this matter of *nudum pactum*; and it is very curious. "He then explained the principle of an agreement being looked upon "as a *nudum pactum*, and how the notion of *nudum pactum* firſt came "into *our* law. He ſaid it was echoed from the *civil* law. '*Ex nu-* "*do pacto non oritur actio.*' Vinnius gives the reaſon in Lib. 3, tit. *de* "*obligationibus*, 4 *to Ed.* 596. If by *ſtipulation*, (and a *fortiori*, if by "writing) it was good *without* conſideration. But it was made requi- "ſite in order to put people upon attention and reflection, and to "prevent obſcurity and uncertainty: and in that view *either* writing "or certain formalities were required. *Id. on Juſtinian* 4 *to Ed.* 614. "Therefore it was intended as a guard againſt raſh, inconſiderate, "declarations: but if an undertaking was entered into upon *delibera-* "*tion and reflection* it had activity; and ſuch promiſes were binding. "Both *Grotius and Puffendorf* hold them obligatory by the law of na- "tions. *Grot. lib.* 2. *c.* 11. *de promiſſis. Puff. lib.* 3. *c.* 5. They are "morally good, and only require *aſcertainment*. Therefore there is "no reaſon to *extend* the principle, or carry it farther. There would "have been no doubt upon the preſent caſe, according to the *Roman* "*law*; becauſe here is both *ſtipulation* (in the expreſs Roman form) "and *writing*."

Mr. Juſtice Wilmot then refers to a paſſage in Bracton which will be conſidered preſently, and proceeds thus, "Our *own* lawyers have "adopted exactly the ſame idea as the *Roman* law. *Plowden*, 308, *(b.)* "in the caſe of *Sherynton and Pledal v. Strolton and others*, mentions "it: and no one contradicted it. He lays down the diſtinction be- "tween contracts or agreements in *words* (which are more baſe) and "contracts or agreements in *writing* (which are more high); and puts "the diſtinction upon the *want* of deliberation in the former caſe, "and the full *exerciſe* of it in the latter. His words are the marrow "of what the *Roman* lawyers had ſaid. 'Words paſs from men "*lightly*;' but where the agreement is made by *deed*, there is more ſtay, "&c." "The delivery of a deed is a ceremony in law, ſignifying "fully his good will that the thing in the deed ſhould paſs from him "who made the deed, to the other; and therefore a deed, which "muſt neceſſarily be made upon great thought and deliberation, ſhall "bind, without regard to the conſideration." "The *voidneſs* of the "conſideration is the ſame in reality, in both caſes: The *reaſon* of "adopting the rule was the *ſame* in both caſes; though there is a "difference in the *ceremonies* required by each law. But *no ineffi-* "*cacy* ariſes *merely* from the naked promiſe. Therefore if it ſtood *only* "upon the naked promiſe, its being in this caſe reduced into *writing*,

" *is a ſufficient guard againſt ſurprize;* and therefore the rule of *nudum* " *pactum* does not apply in the preſent caſe.

" I can not find, that a *nudum pactum evidenced by writing* has ever " been holden bad; and I ſhould think it good: though where it is " *merely verbal*, it is bad. Yet I give *no opinion* upon its being good " *always* when in writing." " It has been melting down into com- " mon ſenſe, of late times."

Yates and Aſton, juſtices, concurred in opinion, nearly on the ſame grounds.

This opinion of the court in *Pillans v. Van Mierop*, does not ſeem to be contradicted by any ſubſequent caſe, ſo far at leaſt as it affirms this principle, that a *written* promiſe carries with it *primâ facie* evidence of a good conſideration, (until the contrary appears;) and throws the burthen of proof upon the oppoſite party. So that in an action between the original parties, upon a promiſe in writing, it does not ſeem to be neceſſary to aver a conſideration:* Blackſtone's opinion, (2 *Com.* 446,) goes further than this, for he ſays, " if a man gives a

* At the time this argument was made, the writer had not ſeen the caſe of *Rann v. Hughes*, in the Houſe of Lords, reported in a note to the caſe of *Mitchinſon v. Hewſon*, 7 *T. R.* 350, which is ſaid, in a note to the 3d edition of Doug. 683, to have been decided 14th of May, 1778, and to be reported in 7 *Br. Parl. caſes*, 550. Nor is the caſe mentioned by Powell or Fonblanque in treating of this ſubject.

The Lord Chief Baron Skynner, in delivering the opinion of the judges, has theſe obſervations. " But it is ſaid that if this promiſe is in writing, that takes away the neceſſity " of a conſideration, and obviates the objection of *nudum pactum*, for that cannot be where " the promiſe is put in writing;" " but whatever may be the rule of the civil law, there " is certainly none ſuch in the law of *England*. His lordſhip obſerved, upon the doctrine " of nudum pactum by Mr. J Wilmot, in the caſe of *Pillans v. Van Mierop and Hopkins*, " 3 *Bur.* 1663, and that he contradicted himſelf, and was alſo contradicted by *Vinnius* in " his comment on *Juſtinian*.

" All contracts are by the laws of *England* diſtinguiſhed into agreements by *ſpecialty*, " and agreements by *parol*; nor is there any ſuch third claſs, as ſome of the counſel have " endeavored to maintain, as contracts in writing. If they be merely written, and not " ſpecialties, they are parol, and a conſideration muſt be proved. But it is ſaid that the " ſtatute of frauds has taken away the neceſſity of any conſideration in this caſe; the ſta- " tute of frauds was made for the relief of perſonal repreſentatives and others, and did not " intend to charge them further than by common law they were chargeable. His lord- " ſhip here read thoſe ſections of that ſtatute which relate to the preſent ſubject. He ob- " ſerved that the words were merely negative, and that executors and adminiſtrators " ſhould not be liable out of their own eſtates, unleſs the agreement upon which the " action was brought, or ſome memorandum thereof, was in writing and ſigned by the " party. But this does not prove that the agreement was ſtill not liable to be tried " and judged of, as all other agreements in writing are, by the common law, and does " not prove the converſe of the propoſition, that, when in writing, the party muſt be, " at all events, liable. He here obſerved upon the caſe of *Pillans v. Van Mierop*, in *Bur.* " and the caſe of *Loſh v. Williamſon*, *Mich.* 16 *G* 3. in *B. R*; and ſo far as theſe caſes " went on the doctrine of nudum pactum, he ſeemed to intimate that they were errone- " ous. He ſaid that all his brothers concurred with him, that in this caſe there was not

" promiſſory note, *he ſhall not be allowed to aver the want of a conſide-* " *ration* in order to evade the payment; for every note *from the ſub-* " *ſcription of the drawer*," " carries with it internal evidence of a good " conſideration." The caſe, however, which he cites from *lord Raym.* 760, does not bear him out in the full extent of his propoſition; for the court ſaid, that " though no conſideration was *expreſſed* in *Hurſt's* " note, yet the note, being ſubſcribed by *Hurſt*, was *good* evidence of " a debt due from *Hurſt* to the plaintiff."

There is certainly a difference between *good* evidence, and incontrovertible, or *concluſive* evidence. The expreſſion *good* evidence, ſeems to imply only *primâ facie* evidence. And this ſeems to be the extent of the propoſition, as it applies in an action between the original parties to a note, for when it is negotiated and the action is between an indorſee and the maker, the latter will not be allowed to aver the want of a conſideration, becauſe " its operation is then governed by " the ſame law as a bill of exchange, which is the law merchant; and " that is founded upon the law of *nature and nations*, in which the want " of a conſideration is no eſſential defect in a contract," (1 *Powell on* " *contracts*, 341,) and in which the great leading principle is, *fides eſt* " *ſervanda.* 1 *Fonb.* 338, *note (d.)*

Powell and *Fonblanque* have both controverted the doctrine as laid down by *Wilmot*, in the caſe of *Pillans v. Van Mierop*, and by *Blackſtone* in the paſſage above cited; but their arguments only go to prove that a note in writing is not *concluſive and incontrovertible* evidence of a good conſideration, between the original parties; and it is believed a caſe can not be found in which the plaintiff has been put to prove the conſideration of a written promiſe, by a *mere denial* on the part of the defendant. It ſeems to be the rule, that the plaintiff is not obliged to

" a ſufficient conſideration to ſupport this demand, as a perſonal demand againſt the de- " fendant, and that its being now ſuppoſed to be in writing makes no difference."

This caſe, as far as it goes, muſt be conſidered as having decided the law in *England*, where the deciſions of the higheſt court of judicature are regarded as *binding*. But in this country it can only be reſpected as an opinion; and the queſtion is ſtill open as to the grounds of that opinion.

It is not contended that a promiſe in writing can not be a *nudum pactum*; but the queſtion is whether the burden of proof is not thrown upon the promiſor; or whether the writing does not raiſe a *primâ facie* preſumption of a good conſideration. How far this queſtion is affected by the caſe of *Rann and Hughes*, is left to the conſideration of the reader.

If a promiſſory note is admitted to be a mercantile inſtrument, and governed by the law merchant, the queſtion of *nudum pactum* can not ariſe in the preſent caſe. For it is believed to be ſettled law, that " a *nudum pactum* does not exiſt in the uſage and law of merchants."

Browne, in his *view of the civil law*, *vol.* 1 *p.* 358, in a note, ſpeaking of writings not under ſeal, as conſidered at common law, ſays, " they may be evidence of the agreement, " or intent of the parties, but not *concluſive* evidence of ſufficient conſideration;" and cites the caſe of *Rann v. Hughes*.

prove the conſideration of ſuch a promiſe, until the defendant has proved circumſtances tending to deſtroy the preſumption ariſing from the written contract. Powell and Fonblanque have taken *oppoſite* premiſes, and yet both draw the ſame concluſion. The former ſays, *(in his eſſay on the law of contracts, Vol. 1. p. 340.)* "Now it ſeems "reaſonable to conjecture, that when this maxim of the *Roman* law, "*quod ex nudo pacto non oritur actio,*" was adopted and received into "our ſyſtem, *it was adopted in its full extent.*"

Fonblanque, *(Vol. 1. p. 326, note a.)* ſays, "The civil law is ſo gene-"rally referred to in the diſcuſſion of this ſubject, that it may be ma-"terial to take a curſory view of the different means by which a legal "obligation was created by that law, in order to ſhew, *that though* we "have borrowed the phraſe *nudum pactum* from the civil law, and the "rule which decides upon the nullity of its effect, *yet that the common "law has not in any degree been influenced by the notions of the civil law, in "defining what conſtitutes nudum pactum.*"

He then cites authorities to ſhow that by the civil law a promiſe in writing might be a *nudum pactum*, and therefore not capable of ſupporting an action, and hence *ſeems to infer* that ſuch is the rule of the common law.

However, both Wilmot and Blackſtone are ſupported by Bracton, who appears to be the firſt writer upon the Engliſh law, who has noticed the doctrine of *nudum pactum*. *Bracton*, has certainly interwoven many of the principles of the civil law with his obſervations on the common law, but it is believed he has done it only in caſes where the common law has recognized thoſe principles. The paſſages of Bracton, alluded to by Wilmot, in the caſe before cited, are the following: *Book 3d. c. 1. §. 2. p. 99. edition*, 1640. "Videndum eſt etiam unde actio oritur? Et ſciendum eſt quod ex obligationibus, tanquam à matre, filia. Obligatio autem, quæ eſt mater actionis, originem ducit et initium *ex aliqua cauſa præcedente*, ſive ex contractu vel *quaſi*, ſive ex maleficio vel *quaſi*. Ex contractu vero oriri poterit multis modis, ſicut ex conventione, per interrogationes et reſponſiones, ex conceptione verborum quæ voluntates duorum in unum trahit conſenſum, ſicut ſunt pacta, conventa, quæ *nuda* ſunt aliquando, aliquando *veſtita; quæ, ſi nuda fuerint, exinde non ſequitur actio, quia ex nudo pacto non naſcitur actio.* Oportet igitur quod habeat *veſtimenta*, de *quibus* inferius dicendum eſt.—In the next chapter, §. 1, in the ſame page he tells us what are thoſe *veſtimenta* which prevent pacts from being *nude*.

Eſt enim *ob*ligatio, quaſi *contra* ligatio, et quatuor habet ſpecies, quibus contrahitur, et *plura* veſtimenta. Contrahitur enim *re*, verbis,

ſcripto, conſenſu, traditione, junctura, quæ omnia dicuntur *veſtimenta* pactorum."

And in §. 9, of the ſame chapter, he ſays, "Inventæ autem ſunt hujuſmodi ſtipulationes et obligationes ad hoc, quod unuſquiſque habeat et ſibi acquirat quod ſuâ intereſt, ſi contra ea agatur quæ in ſtipulationem deducuntur. Et ſi res in ſtipulatione deducta *alii detur*, nihilominus intererit ſtipulatoris, *quia ille qui promiſit*, tenebitur ad intereſſe, vel ad pœnam, ſi pœna fuerit in ſtipulationem deducta."

"Per *ſcripturam* verò obligatur quis, ut ſi quis *ſcripſerit alicui ſe debere, ſive pecunia numerata ſit, ſive non*, obligatur *ex ſcriptura, nec habebit exceptionem pecuniæ non numeratæ contra ſcripturam, quia ſcripſit ſe debere.* Et non ſolum obligatur quis per verba, ſed per ſcripturam, et per literas, non ut literæ quidem ipſæ, vel figura literarum obliget, *ſed oratio ſignificativa quam exprimunt literæ;* ſed utrumque cooperatur ad obligationem, oratio ſignificativa cum litera."

Theſe expreſſions of Bracton are ſtrong and clear; and if he is to be conſidered as only borrowing *terms* from the civil law to expreſs his ideas of the common law, they are certainly concluſive.

The reaſon of the rule ſeems to be truly given by Plowden, in the caſe cited by Mr. Juſtice Wilmot; and if a written promiſe is not within the reaſon of the rule, it would ſeem that the rule cannot apply. In the ancient books no notice is taken of any written agreements but thoſe under ſeal; and the reaſon probably is that in thoſe times by far the greater part of the people could not write, ſo as to ſign their names to an inſtrument. Hence a ſeal was ſubſtituted for a ſignature; not becauſe it was a more ſolemn act, but from the neceſſity of the caſe. Witneſſes alſo were produced for identifying the ſeal, and not to add to the obligation of the contract. But the difference between ſealed inſtruments and others, has now become obſolete in practice; for there is no caſe of a contract, where the intereſts of third perſons are not involved, in which the defendant may not either at law or in equity, avail himſelf of the want of conſideration. And the moſt trifling conſideration is now held ſufficient to take even parol contracts out of the rule of *nudum pactum.*

In *Styles* 419, *Bunniworth v. Gibbs*, chief juſtice Roll ſaid, "a little conſideration will ſerve to ground a promiſe on." *Blackſtone*, 2 *Com.* 445, ſays, "*any degree* of reciprocity will prevent the pact from being *nude.*" And *Wilmot*, 3*d Bur.* 1666, ſaid, "the *leaſt ſpark* of a conſideration will be ſufficient." In *Fenner v. Meares*,

2 *W. Bl.* 1271, Judge Blackſtone ſaid, that "the aſſignment and "other tranſactions were fully ſufficient as a conſideration to make "the aſſumpſit to the aſſignee binding." And in *Hawkes v. Saunders*, *Cowp.* 290, lord Mansfield ſaid, that "a legal or equitable duty is a "ſufficient conſideration for an actual aſſumpſit;" and that it "was "too narrow ground" to ſay that "there muſt be either an immedi-"ate benefit to the party promiſing, or a loſs to the perſon to whom "the promiſe was made." And Buller declared the *true rule to be*, "that wherever a defendant is under a *moral* obligation, or is liable "in conſcience and equity to pay, that is a ſufficient conſideration." But even admitting that the rule of *nudum pactum* applies to written contracts, yet in the preſent caſe there is a ſufficient conſideration. For according to judge Blackſtone, "the aſſignment and other tranſ-"actions," and particularly the payment of the money by the intermediate indorſer to the defendant, were certainly ſufficient conſiderations to ſupport the aſſumpſit.

Upon the whole, therefore, whether this caſe be conſidered upon the ground of a promiſſory note before the ſtatute of Anne, or upon general principles of common law, the count for money *had and received*, ſeems to be well ſupported by the evidence offered.

IX. It is believed that no caſe has been reported in Virginia in which this queſtion has been decided. There are caſes, however, which may poſſibly be conſidered as affecting ſome of the principles involved in the preſent enquiry.

In *Mackie and Davis*, 2 *Waſh.* 229, it is held that the *aſſignee* of a bond may maintain indebitatus aſſumpſit for money had and received againſt the *aſſignor*, upon principles of common law. There are, in that caſe, ſeveral aſſertions and admiſſions of counſel which are deemed not to be correct, but are warranted only by a few immature obſervations of ſome of the writers ſince the ſtatute of Anne. One of the counſel ſeems to conſider the cuſtom of merchants as no part of the common law. This has been ſhewn to be an incorrect poſition, by the concurrent adjudications of a long ſeries of years. It is ſaid alſo that "as to promiſſory notes, the right of recovery againſt the "indorſer is expreſsly given by the ſtatute of Anne, and from this "proviſion, an *invincible* argument is to be drawn in favour" of the defendant, "for if in a commercial country like England, it was ne-"ceſſary for the legiſlature to provide a remedy againſt the indorſer of "a promiſſory note, it is obvious that no ſuch right exiſted at com-"mon law." But if the ſtatute of Anne was in affirmance of the law as it ſtood before, and only enacted to remove the *doubts* which

had been raiſed by lord Holt's deciſion in *Clerk v. Martin*, then this argument totally fails. And that ſuch was the fact is believed to be proved by the authorities before cited.

One of the counſel for the plaintiff conſidered the caſe as ſtanding on the ſame ground *as notes of hand did before the ſtatute of Anne*; and denies that notes were within the cuſtom of merchants, for which he cites Kyd as an authority; but Kyd ſays only "that it *was held*," &c. and relies on the caſe of *Clerk v. Martin*, and the preamble of the ſtatute. And in the ſame manner, every like aſſertion in the modern books may be traced up to the ſame ſource. The only authority which can ſupport the poſition is the caſe of *Clerk v. Martin*. The ſtatute of Anne having put the queſtion at reſt, no one has taken the pains to examine the real ſtate of the law prior to the ſtatute, but one writer after another has repeated the aſſertion without the leaſt examination. In England it is of no importance whether they are correct or not; but in this country, where few of the ſtates have adopted the ſtatute, it becomes intereſting to know how the law really ſtood before. In the caſe of *Mackie and Davis*, the counſel and the court place much reliance on the *privity* between the indorſer and his immediate indorſee, and it is evident that they borrowed their ideas from *Kyd on bills* 114. But Kyd cites no authority for his obſervations; nor are they warranted by any adjudged caſe, at leaſt ſo far as they apply to the action for money had and received. *Judge Roane* ſays, "The caſe of promiſſory notes will be an important guide, and "therefore it will be proper to ſee how they ſtood previous to the ſta-"tute which it is ſuppoſed created the liability of the indorſer of "them." But he proceeds no farther in his inveſtigation than to the "caſe of *Lambert v. Oakes*, 20*th May*, 11, *W.* 3. He ſays, this "caſe was decided antecedent to the ſtatute of Anne, and was *conſe-"quently* governed by the principles of the *common law*." If he conſidered the cuſtom of merchants, as part of the common law (as it really is) he was certainly correct. But the probability is that the declaration was in that caſe grounded on the cuſtom of merchants: 1ſt, becauſe that was the uſual and eſtabliſhed form of declaring on promiſſory notes in thoſe days: 2dly, becauſe there had not at that time been a diſtinction diſcovered between a promiſſory note and an inland bill of exchange. 3dly, Becauſe there never was, either before or ſince the ſtatute of Anne, a time when an *indorſed promiſſory note*, was not conſidered as a bill of exchange; and 4thly, becauſe *four*, out of the five reporters of that caſe call it a bill of exchange, and even lord Raymond himſelf calls it a *bill* throughout his whole report, except in the firſt line, where he calls it a *note*.

Judge Roane further says, that "Bonds, in England, are not assignable, and *therefore* stand in the same situation as notes of hand "did at the time when this case was determined." It is believed, upon the authority of the cases already cited, that there never was a time when a promissory note payable to order was not assignable, and even lord Holt, subsequent to the case of Clerk v. Martin, admitted, in the case of *Buller v. Crips*, that an indorsement of such a note would create a negotiable bill.

In the case of *Norton v. Rose*, 2 *Wash.* 240, the counsel admit that *goldsmiths* notes "*circulated like bills of exchange*" before the statute of Anne, and yet it is contended that promissory notes derived their whole negotiability from the statute. But *goldsmiths* notes were simply *promissory* notes, and were not more negotiable than the promissory notes of any other description of persons. Again, the same counsel observes, "that though notes of hand, according to the statute of Anne, were placed on the same ground with bills of exchange, and of course governed by the same rules, the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange in this country, and thereby gave a convincing proof that it was not their intention to suffer bonds to be governed by those rules which applied to bills." And in confirmation of his argument he cites *Dall. Rep.* 23. Judge Roane observes, "that notes of hand are *now* assignable in England, and it is admitted that the assignee is discharged of any equity which existed against the assignor, unless the note was given for an usurious or gaming consideration. The reason of this is, not that the principle attached to them is a legal consequence of their being made assignable, but because this rule, *for commercial purposes*, applied to bills of exchange; and the statute of Anne, declaring notes assignable *in like manner as bills of exchange*, shewed an intention, as it is was supposed, to render the former as highly negotiable, and as current in internal, as the latter were in external commerce. The act of our assembly embraces *equally* the subject of bonds and *notes*, *but contains no expressions tending to induce a belief that the making them assignable was intended for purposes of commerce.* The design certainly was to make them transferable to a certain extent; *the provision points out the limits of their negotiability*, and fixes a strong mark of distinction between them and bills of exchange. As to the latter they were *always* assignable, and the indorsement transferred a legal right to the indorsee. They did not owe this quality to statutary provisions, and of course they continued within that principle which had attached to them, and of which they were not deprived by any statute." He then cites the case of *Peacock v. Rhodes*, *Doug.* 636,

where lord Mansfield obſerves that the indorſee of a promiſſory note or bill of exchange is not to be conſidered in the light of an aſſignee at common law, becauſe it would ſtop their currency and injure trade and commerce.

He then proceeds. "It is therefore, not becauſe the indorſee is "the aſſignee of the *legal* right to ſuch bills and promiſſory notes, that "the equity is barred by the indorſement, but becauſe of their qual- "ity as a *currency*, and from the neceſſity of adopting ſuch a princi- "ple, *for the convenience of trade and commerce* with reſpect to ſuch "currency. But bonds are not to be conſidered as a currency, and "within the reaſon of the principle laid down in *Peacock v. Rhodes*; "for that principle is founded on *commercial conſiderations* altogether, "and not upon a diſtinction between legal and equitable aſſignments." "The proviſion of this act has long governed the aſſignment of bonds, "and it is but of late years that the exiſtence of ſuch a principle, as "has been contended for in this cauſe, has been thought of as appli- "cable to bonds and *notes*."

Carrington, Juſtice. "To conſider this caſe upon general princi- "ples; the queſtion is whether an equity, originally attached to a "bond, follows it into the hands of an aſſignee without notice. In "*England*, notes of hand *were not aſſignable until the 3d and 4th of* "*Queen Anne*, ſo as to enable the aſſignee to bring ſuit in his own "name. Courts of *equity* were *of courſe* reſorted to, where the maker "of the note was not precluded from ſetting up any equitable defence "which he might have. Frequent attempts were made by the bankers "and traders to bring them within the cuſtom of merchants, and to "place them upon the ſame footing of negotiability with bills of "exchange. *But the judges ſtill conſidered them merely as evidences of* "*debt*. At length the ſtatute was procured, conformably with the "wiſhes of the trading part of the community, *making* them aſſign- "able, *in like manner as bills of exchange*. The likeneſs thus ſtrongly "ſanctioned by legiſlative authority, produced ſimilar deciſions in "caſes where their negotiability was concerned. But no efforts were "made in favour of bonds, and they remain in the ſame ſituation "*in England* as they ſtood at common law. This country was then "a part of the Britiſh empire, and our legiſlature aſſimilated its laws "to thoſe of the mother country ſo far as our local ſituation and ſtate "of ſociety authorized it. In 1705, ſhortly after the Engliſh ſtatute "paſſed reſpecting notes of hand, the aſſembly paſſed a law authoriz- "ing the aſſignment of bonds and notes. This law I cannot meet "with, but it was repealed by proclamation in 1730, and in the ſame "year another law was enacted exactly ſimilar to the act of 1748.

"With the Engliſh ſtatute before their eyes the legiſlature did not "chuſe to adopt it altogether, or to introduce into it a principle "which ſhould defeat the equity of the obligor, as it was ſecured to "him at common law. Thoſe expreſſions, in the ſtatute, which "aſſimilated notes to bills of exchange, were omitted in our law, and "in the room of them, others were introduced, which eſtabliſhed an "*oppoſing principle*. The negotiability of bonds and notes was quali- "fied and reſtricted within bounds conſiſtent with the commercial "ſtation of this country. There was no neceſſity for *exalting* thoſe "kinds of paper to the *high ground* on which the *commercial* world had "placed bills of exchange, and the whole complexion of the law "ſhews that it was intended to be avoided. The doctrine which has "been ſtated and relied upon, as applicable to *foreign* bills of ex- "change, is conſequently inapplicable to the preſent diſcuſſion. Theſe "conſiderations have produced concluſions in the public mind, as to "the conſtruction of the law in queſtion, the very reverſe of what "has been contended for by the counſel for the appellee. I ſhould "be unwilling to unſettle theſe long formed opinions, unleſs the "expreſſions of the law rendered it abſolutely neceſſary. That a "bond, fraudulent and void in its creation, can not be cleanſed of its "impurity, and rendered valid, by aſſignment, is ſettled by the caſe "of *Turton v. Benſon*, and has uniformly been ſo decided in the "courts in this country. No man can, by the mere act of aſſign- "ment, transfer a greater intereſt than he holds; diſpoſe of an in- "tereſt where he has nothing, or make good and valid, that which "was originally vicious and void. *In this enlightened age* though, "former deciſions are rejected, and a new mode of attaining juſtice "is diſcovered. But is it true that the means are adequate to the ob- "ject? It is urged, as a reaſon for the rejection of former opinions "upon this ſubject, that they tended to impoſe deceptions on the "public, and to cramp commerce by deſtroying the negotiability of "bonds and notes. As it ſtrikes me, they rather tend to prevent, "than to countenance thoſe frauds, and if the other conſequences will "follow, it is preferable to ſacrificing a majority of the public to the "avarice and injuſtice of a few. But I cannot perceive how com- "merce, or that ſort of it which is moſt uſeful to ſociety, can be in- "jured. That their negotiability will be reſtrained I admit, but they "will anſwer the purpoſes for which the law intended them, by fa- "cilitating the collection of debts, and thereby affording a conveni- "ent and deſirable accommodation to the people of this country."

Judge Lyon, in giving his opinion, obſerved that the arguments "uſed to aſſimilate this to the caſe of a bill of exchange and promiſ- "ſory note, are totally without foundation. The reaſon of the law

" as applicable to thoſe caſes, is not founded upon the principle ſtated " by the counſel for the appellee, but upon conſiderations *altogether* " *of a commercial nature.*"

Theſe obſervations certainly claim great reſpect, not only as coming from the higheſt court of judicature in Virginia, but as containing the opinions of gentlemen high in the confidence of the people of that ſtate, and whoſe deciſions have been ſo generally correct. But ſtill their weight depends upon the accuracy of the facts on which their opinions are founded, and the correctneſs of the arguments derived from thoſe facts. In this caſe of *Norton and Roſe*, the queſtion was not upon a promiſſory note, but whether an equity, originally attached to a bond, follows it into the hands of an aſſignee without notice. Hence what is ſaid reſpecting promiſſory notes comes in incidentally, and was not properly before the court. The deciſion as far as it reſpects the queſtion before the court ſeems to be correct.

The obſervations in theſe caſes from Virginia, reſpecting promiſſory notes, may be reduced to three propoſitions.

1ſt. That promiſſory notes were not negotiable before the ſtatute of Anne, ſo as to enable the indorſee to bring an action in his own name.

2d. That the act of aſſembly, by aſſimilating notes to bonds, ſhows an intention in the legiſlature to reſtrain the negotiability of both within the ſame limits.

3d. That the negotiability given by the act of aſſembly to bonds and notes was not " intended for purpoſes of commerce."

The firſt of theſe propoſitions is clearly incorrect. It never was doubted until the caſe of *Clerk v. Martin*, in the *firſt year of queen Anne*, that a promiſſory note was a bill of exchange, even between the *payee* and the *maker*. *And* NO CASE *has yet decided that a promiſſory note, payable to order and indorſed, is not a good bill of exchange.* It was never *doubted* until the caſe of *Buller v. Crips*, in the 2*d year of queen Anne*, and that caſe was never decided. Judge Carrington ſays, "*courts of equity* were *of courſe* reſorted to;" that is, becauſe the indorſee could not bring a ſuit at law in his own name. If this was the caſe, it muſt have happened between *Michaelmas term*, 2 *Anne*, when *Buller v. Crips* was argued, and 3 *and* 4 *Anne*, when the ſtatute was enacted. For before the 2*d Anne* the indorſee *could bring and ſupport* a ſuit in his own name, at law, againſt the maker or any or all of the other

parties to the note. The caſe of *Buller v. Crips* only *raiſed a doubt*, and the ſtatute followed immediately and diſpelled it. No caſe, it is believed, can be found of an application to equity on the grounds ſuggeſted by the judge.

The ſecond propoſition, that the act of aſſembly, by aſſimilating notes to bonds, intended to reſtrain their negotiability within the ſame limits, contains an argument which, if uſed at the trial, was not much inſiſted on, but which ſeems to be the only ground upon which a doubt can be ſupported. It is much to be regretted that the act of 1705, c. 34, is not to be found, as it would probably throw ſome light upon the ſubject. Its title does not, like that of its ſucceſſors, mention promiſſory notes. It is "An act declaring how long judg-"ments, bonds, obligations and accounts ſhall be in force; for the "aſſignment of *bonds and obligations*; directing what proof ſhall be "ſufficient in ſuch caſes, and aſcertaining the damage upon proteſted "bills of exchange."

Whether the legiſlature of Virginia, at the time of paſſing this act, had before them the ſtatute of 3 *and* 4 *Anne*, *c.* 9, is very doubtful. It is not probable that the acts of that ſeſſion of parliament were printed until ſome time after the end of the ſeſſion, which was on the 14th of March 1705, on which day the ſtatute of Anne reſpecting promiſſory notes received the royal aſſent.

The Virginia aſſembly of 1705 met on the 23d of October in the ſame year. There does not ſeem to have exiſted any particular motive for tranſmitting in the *moſt* expeditious manner the new acts of parliament; and if their tranſmiſſion was left to accident, as was probably the caſe, the preſumption is, (eſpecially as it was a time of war) that the legiſlature of Virginia had no knowledge of the Engliſh ſtatute until after their ſeſſion of 1705. But however this may be, there is at preſent no evidence that *promiſſory notes* were made aſſignable by that act of aſſembly.

The act of 1730, c. 5, is entitled "An act for aſcertaining the da-"mage upon proteſted bills of exchange: and for the better reco-"very of debts due on promiſſory notes; and for the aſſignment of "bonds, obligations and *notes*." As the act of 1705 was repealed by proclamation in 1730, it is not probable that the new act of that year would re-enact the ſame thing in ſubſtance. Hence a material variance may be preſumed between the two. The act of 1730, c. 5. §. 8. is as follows: "And to the end the recovery of money upon pro-"miſſory notes, and other writings without ſeal, may be rendered

"more eaſy, be it enacted, &c. that if any perſon or perſons ſhall have "ſigned or hereafter ſhall ſign any note, or by any other writing, he, "ſhe, or they have promiſed or obliged, or ſhall promiſe or oblige "him, her, or themſelves to pay any ſum of money, *or quantity of* "*tobacco, to any other perſon* or perſons, ſuch perſon or perſons, to "whom the ſame is or ſhall be payable, ſhall and may commence and "maintain an action of debt, and recover judgment for what ſhall "*appear* to be due thereupon, with coſts." And by the *11th ſect.* it is enacted, "That it ſhall and may be lawful to and for *any* perſon "or perſons to aſſign and transfer *any* bond or bill for debt, or any *ſuch* "note as aforeſaid, to any other perſon or perſons whatſoever: And "that the aſſignee or aſſignees, his and their executors and admini-"ſtrators, by virtue of ſuch aſſignment, ſhall and may have lawful "power to commence and proſecute any ſuit at law in his, her, or "their own name or names, for the recovery of any debt due by "*ſuch* bond, bill, or note, *as the firſt obligee, his executors and admini-"ſtrators* might or could lawfully do: Provided always, that in any "ſuit commenced upon *ſuch* bond, bill, or note, ſo aſſigned, the "plaintiff ſhall be obliged to allow all diſcounts that the defendant "can prove, either againſt the plaintiff himſelf, or againſt the *firſt* "obligee."

The intention of this act ſeems clearly to be to extend and enlarge and not to reſtrict or limit the negotiability of the inſtruments of which it ſpeaks. *Such* bonds, bills and *notes*, as are deſcribed in the act, certainly were never negotiable or aſſignable at common law; and for this plain reaſon, becauſe it was not the intention of the parties to make them aſſignable. The debtor had never conſented to the making his debt negotiable; it would therefore have been unjuſt in the legiſlature not to have given him the full benefit of all diſcounts againſt his original creditor as well as againſt the aſſignee. The notes deſcribed by the act are thoſe by which the ſigner ſhall promiſe or oblige himſelf to pay a ſum of money, or quantity of tobacco, *to any other perſon.* Such a note is not negotiable *in its nature*, nor by the *original contract and intention of the parties*; the ſigner never gave any authority to his creditor to negotiate it, and therefore legiſlative aid was neceſſary to render it negotiable. But legiſlative aid was *never* neceſſary to render negotiable a promiſſory note *payable to order.* Let it be again repeated, that although promiſſory notes had been in common uſe in England for more than half a century before the ſtatute of Anne, yet there *never was an adjudged caſe* in which it was decided that an indorſee of ſuch a note could not maintain an action in his own name againſt any of the parties to the note. But the whole courſe of deciſions was uniformly to the contrary. There was no

neceſſity therefore for the Virginia aſſembly to provide for the negotiability of notes payable *to order*, and hence we find that they confine the act to bonds, bills, and *ſuch* notes as, at common law, ſtood upon the ſame ground as bonds; and were conſidered as mere choſes in action, unaſſignable in their nature, and only ſimple evidence of a debt due by one man to another. Although it muſt be preſumed that the legiſlature of Virginia in 1730 had full knowledge of the ſtatute of Anne, yet it is equally to be preſumed that they knew that it was made in affirmance of the law as it before exiſted, and ſolely to remove the doubts which had been ſuggeſted by lord Holt. It muſt alſo be preſumed that they knew what had been the uniform practice, and courſe of adjudications ever ſince the firſt introduction of promiſſory notes. The evidence which we *ſtill* have of theſe facts is ſtrong and clear; but it muſt have been more ſtrong and clear in the year 1730, when many perſons were living who probably had perſonal knowledge of the whole hiſtory of the ſtatute of Anne. Hence then it may be fairly concluded that the aſſembly intended to leave thoſe inſtruments which in their own nature, and by the conſent of the parties, were negotiable, as well as thoſe which were negotiable under the cuſtom of merchants, to the protection of ſuch principles of law as had been already found ſufficient to ſupport them.

The act of 1748, c. 27, has preciſely the ſame title as the act of 1730, and preciſely the ſame proviſion as to the aſſignment of bonds, bills and notes, making uſe of exactly the ſame expreſſions, excepting that the words, "*before notice of ſuch aſſignment was given to the* "*defendant*," are added immediately after the word "obligee," in the laſt line of the paſſage before cited. So that this act of 1748 gave the aſſignee of *ſuch* bonds, bills and *notes* the ſame remedy at *law*, which he had before in *equity*, and this ſeems to have been the only uſe and intent of the act.

The act of 1786, c. 29, §. 3 *and* 4, is in theſe words, "An ac- "tion of debt may be maintained upon a note or writing, by which "the perſon ſigning the ſame ſhall promiſe or oblige himſelf to pay "a ſum of money or quantity of tobacco *to another*. Aſſignments of "bonds, bills and promiſſory notes, and *other* writings obligatory, "for payment of money or tobacco ſhall be valid; and an aſſignee of "any ſuch, may thereupon maintain an action of *debt*, in his own "name, but ſhall allow all juſt diſcounts, not only againſt himſelf, "but againſt the aſſignor, before notice of the aſſignment was given "to the defendant." This act, although its language is more conciſe, does not, as it reſpects the preſent queſtion, differ in ſubſtance from the act of 1730. It is evident that it refers to the ſame kind

of notes. If notes *payable to order* were negotiable before the paſſing of theſe acts, it is clear that there is nothing contained in either of them to reſtrict that negotiability. This brings us back to the enquiry, what was the law reſpecting *ſuch* notes previous to the ſtatute of Anne. If an indorſed promiſſory note payable to order was in its nature an inland bill of exchange, and if in practice it was always ſo conſidered, there is nothing in the acts of aſſembly of Virginia that forbids its being ſtill conſidered as ſuch. How and when did the law firſt obtain in Virginia reſpecting *inland* bills of exchange? Nothing is ſaid of them in the ſtatute law of Virginia until the act of 1786, c. 29, which adopts the proviſions and nearly the words of the Engliſh *ſtatute of* 9 *and* 10 *W.* 3, *c.* 17, *and* 3 *and* 4 *Anne*, *c.* 9. Their negotiability is taken for granted, and muſt have been derived from the cuſtom of merchants. But the ſame cuſtom which gave negotiability to inland bills of exchange, gave equal negotiability to indorſed promiſſory notes payable to order. It made no diſtinction between them. What the practice has been in Virginia ſeems doubtful. Lawyers differ in their accounts of it; and it can not be conſidered as ſettled.

The caſe of *Lee and Love*, 1 *Call* 499, was by the indorſee againſt the indorſer of a promiſſory note payable to order. The count relied upon was money had and received. But the court held that the plaintiff was not entitled to recover againſt the defendant, becauſe he had not firſt brought ſuit againſt the maker of the note. It is to be regretted that the court did not give their reaſons for ſuppoſing ſuch a ſuit neceſſary. It was ſaid that they conſidered the caſe as having been already decided; and they probably alluded to the caſe of *Mackie v. Davis*, as that is the only caſe cited by the counſel for the defendant. But this point was not decided in that caſe. Judge Carrington ſaid, "As to the lengths which it behoves the aſſignee to go in purſuit of the obligor, before he can reſort to the aſſignor, *it is unneceſſary to lay down any general rule*: it may ſuffice to ſay that in the preſent caſe he went far enough." Judge Roane ſaid, "In this country, the aſſignee of a bond acquires a *legal right to bring ſuit upon it*, and to receive the money, diſcharged from any controul of the aſſignor over the ſubject; it is *therefore* his *duty* to bring ſuit." The duty of bringing a ſuit, does not, at the firſt glance, ſeem to be the *inevitable* conſequence of a right to ſue; and it is regretted that the intermediate terms were not hinted, which connect the concluſion with the premiſes. But the *dictum* of a ſingle judge, however reſpectable, upon a point not neceſſary to ſupport the judgment, can not be conſidered as concluſively ſettling the law. The only points decided in that caſe were, that an aſſignee of a bond might maintain

an action for money had and received againſt the aſſignor; and that the aſſignee had done enough to entitle himſelf to ſuch action, by bringing ſuit againſt the obligor, proſecuting it to judgment, and taking out a *fieri facias* which was returned *nulla bona*.

Theſe ſeem to be all the reported caſes in Virginia which bear upon the preſent queſtion.

In Pennſylvania a number of caſes have occurred, from the whole of which it appears doubtful whether the ſtatute of Anne is to be conſidered as having been extended in practice to that ſtate, or whether their actions upon promiſſory notes are grounded upon the cuſtom of merchants. Their act of aſſembly of 28th May, 1715, ſeems to have been paſſed in the full contemplation of the ſtatute of Anne, but it provides a right of action only for the *indorſee* againſt the *maker*, and that only to recover ſo much "*as ſhall appear to be due at the time* "*of the aſſignment, in like manner*" *as the payee might have done*. But it gives no action to the *payee* againſt the maker, nor to the indorſee againſt any of the *indorſers*. Yet ſuch actions are maintained in that ſtate upon promiſſory notes conſidered *as inſtruments*. Judge Shippen, in the caſe of *Robertſon v. Vogle*, 1 *Dall.* 252, ſays, "there *can be* "*no doubt* that the right of indorſees to call upon the indorſers *muſt* "*be founded on the cuſtom of merchants*." It appears by their act of aſſembly that a right of action already exiſted by the payee againſt the maker; and judge Shippen ſuppoſes it to be under the ſtatute of Anne, which he imagines had been extended in practice to that ſtate. But this could hardly have happened prior to the year 1715, (the date of their act of aſſembly,) which was only ten years after the ſtatute of Anne. He obſerves alſo, that "the legiſlature, when regulating "the aſſignment of bonds and notes, though they did not expreſsly "put them on the ſame footing with bills of exchange, muſt, from "the terms of the act, have taken it for granted that an action might "be brought upon a promiſſory note conſidered as an inſtrument. "Till therefore a contrary opinion is pronounced, *we muſt proceed as* "*in the caſe of a bill of exchange* under the ſtatute of Anne," &c.

But in the ſubſequent caſe of *M'Culloch v. Houſton, in the ſupreme court of Pennſylvania*, 1 *Dall.* 441, chief juſtice M'Kean was of opinion that the legiſlature intended to put promiſſory notes on the ſame footing as bonds, at leaſt ſo far as to admit the equity of a note to follow it into the hands of the indorſee. He ſays, "before this act *it* "*appears* that actions by the payee of a promiſſory note were not "maintained, nor can they ſince be maintained, otherwiſe than by "extending the Engliſh ſtatute of Anne." And to account for this

extenſion of the ſtatute he ſuppoſes "that actions upon promiſſory "notes were brought here ſoon after the paſſing of the ſtatute, by "attornies who came from England, and were accuſtomed to the "forms of practice in that kingdom, but did not perhaps nicely at-"tend to the diſcrimination with regard to the extenſion, or adoption, "of ſtatutes." But this could not have happened in the courſe of ten years ſo as to have eſtabliſhed a practice; for we are firſt to ſuppoſe a practice in England under the ſtatute, a ſubſequent removal of attornies from England to Pennſylvania, and then a practice in Pennſylvania to be eſtabliſhed, and all this between the paſſing of the ſtatute of Anne in the year 1705 and the act of aſſembly in 1715. A more probable conjecture ſeems to be, that the firſt ſettlers who came over from England about the year 1683, were well acquainted with the uſe of promiſſory notes and the laws reſpecting them, as they had been practiſed upon in that country for at leaſt thirty years. The firſt emigrations to Pennſylvania were about the time when the banking buſineſs of the goldſmiths was at its greateſt height, and it was fifteen or twenty years after the firſt ſettlement of Pennſylvania, before a doubt was ſuggeſted whether an action would lay on a promiſſory note as an inſtrument. Hence it is probable that actions on ſuch notes were brought in the ſame manner as they had been uſed in England, to wit, on the cuſtom of merchants; and upon that ground, and not upon the ſtatute of Anne, probably reſts the preſent practice in Pennſylvania.

The practice in New Hampſhire and Maſſachuſetts ſeems to have the ſame foundation. They declare upon promiſſory notes *as inſtruments*, and rely upon the *expreſs promiſe in writing*, without alleging a conſideration or referring to any ſtatute or cuſtom whereby the defendant is rendered liable *without* a conſideration. In Connecticut it is ſaid by *Swift* in his *ſyſtem of the laws*, that the indorſee muſt ſue in the name of the payee; but the *payee* can maintain an action *upon* the note without alleging any cuſtom, or ſtatute, or conſideration. In New York they have nearly copied the ſtatute of Anne as far as it relates to promiſſory notes, but how the law was conſidered before their act of Aſſembly of 1788, we are not informed. In Maryland the ſtatute of Anne was conſidered as in force and always practiſed upon. Their declarations have been preciſely in the Engliſh form, alleging the defendant to be liable by *force of the ſtatute*, and the courts have ſtrictly adhered to the adjudications in England. Hence nothing concluſive can be inferred from the practice of the ſtates.

The third propoſition drawn from the reported caſes in Virginia is, that the negotiability given to bonds and notes by the act of aſſembly

of that ſtate, *was not intended for purpoſes of commerce.* It ſeems difficult to aſſign a reaſon why the legiſlature ſhould have made bonds and notes aſſignable, unleſs it was to enable people to transfer that kind of property which exiſted in ſuch bonds and notes; and the transfer of property is the only means of commerce. It will not be contended that the ſole object of the legiſlature was to enable the holders of ſuch paper to give it away in voluntary donations. It muſt therefore have been intended to enable them either to paſs it away in payment of debts previouſly contracted in the way of commerce, or to make it in itſelf an article of merchandize. If, therefore, for the purpoſes of commerce, the legiſlature intended to make thoſe contracts negotiable, which were not ſo either in their nature or by the conſent of the parties, it is fair to preſume that they did not mean to impede the negotiability of ſuch as were in their own nature negotiable, and were expreſsly intended to be made ſo by the will of the contracting parties. If there were any principles of law which would ſupport the negotiability of a promiſſory note payable to order, it can not be ſuppoſed that the legiſlature intended by *implication* alone, to obſtruct their operation. And even admitting that they did not, by the act making bonds and notes aſſignable, mean to aid commerce, yet it can not be preſumed that they intended to wage war with thoſe commercial principles which were already eſtabliſhed.

This brings us back again to the firſt enquiry, what were the principles upon which the negotiability of promiſſory notes was ſupported before the ſtatute of Anne. If ſuch principles did exiſt, there ſeems to be nothing in this act of aſſembly which prevents their full operation in Virginia.

The concluſion from the whole is, that there is no principle derived either from the common law, or from the act of aſſembly of Virginia, which will prevent a court of law from carrying into effect the contract of the parties according to their original intention.

Even admitting that the contract of the defendant is not negotiable at law ſo as to enable the plaintiff to declare upon the inſtrument itſelf, yet it can not be denied that it is aſſignable in equity, and if ſo, the plaintiff becomes in equity entitled to the money which the defendant received from the intermediate indorſer; and in ſuch a caſe, there never has been a doubt ſince the time of lord Mansfield, that the plaintiff is entitled to recover in an action for money had and received.

Note (B.)

THIS caſe was much debated in the court below. It appeared from the books that the only reported caſe in which it had been decided that an action of debt would not lie upon a promiſſory note, was that of *Welſh v. Creagh*, 11 *Geo.* 1, 8 *Mod.* 373, 1 *Str.* 680, which is ſo inaccurately reported that it is impoſſible to ſay between what parties to the note the action was. In 8 *Mod.* "it was ſaid that "it would not lie againſt the *indorſer*, but that it would lie againſt the "*drawer*." But we collect from the report, that the reaſon of the deciſion was, that before the ſtatute of *Anne*, no action at all would lie *upon* the note, *as a note*; (for which the caſe of *Clerk v. Martin*, 1 *Salk.* 129, was cited). That the ſtatute gave only the ſame kind of action as upon inland bills, and that an action of *debt* was never known to be brought upon a bill of exchange. And probably the court in that caſe relied on *Hard.* 485, to ſupport this poſition.

Another reaſon given is, that the ſtatute declares "that the *aſſignee* "or *indorſee* may maintain an action againſt the *drawer* or *indorſer*, "and recover *damages*, &c. which ſhews that an action of debt will "not lie, becauſe damages are never recovered in *debt*."

The firſt poſition, viz. that no action, before the ſtatute, would lay upon a note, *as a note*, ſeems not to be correct, although ſupported by the caſe of Clerk and Martin, for that caſe was directly contrary to the whole current of authorities prior to that time, particularly to the caſe of *Williams v. Williams*, 5 *W. and M. Carth.* 269; and the ſtatute of *Anne* ſeems to have been made, not to alter the law, but to over-rule this caſe of *Clerk v. Martin*, and to place promiſſory notes on the ſame footing on which they ſtood prior to that deciſion. (See the preceding note.)

It is true that in *Milton's caſe*, *Hard.* 485, it was decided that an action of *debt* would not lie againſt the *acceptor* of a bill of exchange; but the reaſon given ſhows that it would lie againſt the maker of a promiſſory note. For it was ſaid that the undertaking of the acceptor was only *collateral*, to pay the debt of another, and that the *drawer* continued *debtor*, notwithſtanding the acceptance. So that the reaſon ſeems to be that the *acceptor* was not the original debtor. But the maker of a promiſſory note is the original debtor, and therefore an action of debt would lie againſt *him*, by the ſame rule that it would not lie againſt the acceptor of a bill.

In *Baker v. Hill*, 3 *Keb.* 627, the action was *debt* on an inland bill, but it is not ſtated between what parties. There was a demurrer to the *plea*, and judgment for the plaintiff. This was eight years after the caſe in Hardres. And in the caſe of *Brown v. London*, 2 *Keb.* 695, 713, 758, 822. 1 *Vent* 152. 1 *Lev.* 298, *and* 1 *Mod.* 285, it ſeems to be admitted that an action of *indebitatus aſſumpſit* for money had and received would lie, if the acceptor had the money in his hands to pay.

In early times "all matters of perſonal contract were conſidered as "binding only in the light of *debts*; and the only means of recovery "was by this *action of debt*." 1 *Reeve*, 159. It was not without repeated ſtruggles that the action on the caſe was permitted to be brought for breach of a perſonal contract. Even as late as the reign of *Queen Elizabeth* it was conſidered as a matter of great doubt whether *aſſumpſit* would lie in any caſe where an action of *debt* might be brought. The court of *King's bench* held that it would; and the *commonpleas* held that it would *not*; but it was finally determined after great debate before all the judges of England in the *exchequer chamber*, in *Slades caſe*, 4 *Co.* 93, that *aſſumpſit would lie* for the price of corn ſold.

The caſe of *Core v. Woddye*, 28 *H.* 8, *Dyer* 20, is a ſtrong caſe to ſhow that where the defendant has received money to which the plaintiff is entitled, he may have an action of *debt* for it.

A promiſſory note has always been held to be good evidence of money received by the maker of the note to the uſe of the payee. In that caſe the court, in giving their opinion, ſaid, "Admit that there "was not *any bill teſtifying the receipt*, yet by the common opinion of "the books, it is in the election of the bailor to have an action of "*debt*, or account, in ſuch a caſe." And in the caſe of *Meredith v. Chute*, 2 *Ld. Raym.* 760, it was ſaid by the whole court, that a note was good evidence of a *debt* due from the maker to the payee.

In *Godbolt* 49, the action is ſaid to be "*debt* upon a *conceſſit ſolvere*, "*according to the law merchant*." This ſeems to have been ſome kind of an acknowledgment of a debt, in the nature of a promiſſory note.

In *Domingo Franca's caſe*, 11 *Mod.* 345, it was held that *debt* or *indebitatus aſſumpſit* might be brought upon a bill of exchange by the payee againſt the drawer, "becauſe it is in the nature of a ſecurity.

The action of debt was the ordinary remedy upon a *Tally*, which ſeems to have been no better evidence of a debt than a promiſſory note.

A Tally is thus defined by *Spelman* in his *Gloſſary p.* 532, *Edit.* 1637. "Tallium, alias Talea, eſt clavola vel ligni portiuncula, utrinque complanata, cui ſumma debiti inciditur; fiſſaque inde in duas partes, una debitori, altera creditori traditur, in rationis memoriam."

Theſe *tallies* ſeem to have been a kind of common ſecurity for money, and to have been negotiable like bank bills, paſſing from hand to hand by delivery only. 12 *Mod.* 241. Actions of debt upon them are mentioned in *Fitz. ab. Tit. Dett.* 4. 4. *E.* 2. *Fitz. ab. Ley.* 68, 70, *F. N. B.* 122, *I. Dyer* 23, *Hard.* 333, and 2 *Keb.* 713. *Sometimes* they were ſealed, but in general they were without a ſeal and were only evidence of a ſimple contract. Againſt a common tally, the defendant might wage his law; and in *Dyer* 23, it appears, that "there is one book which ſays that a man may wage his law againſt "a ſealed tally, if the tally have only *notches* or *ſcotches* indented, each "*ſcotche* for twelve pence, according to the common uſage; but if "the *ſum be inſcribed* upon the ſealed tally, he ſhall be outed of his "law."

The caſe of *Rumball v. Ball*, 10 *Mod.* 38, was debt upon a promiſſory note; and although an objection was taken to the want of a demand, yet none was made to the *form of the action.*

In *Rudder v. Price*, 1 *H. Bl.* 547, the action was debt upon a promiſſory note, payable by inſtalments; and although the caſe was warmly conteſted, and although *Mr. juſtice Lawrence* who was then at the bar, was for the defendant, yet no objection was ſuggeſted to the form of the action; but it was contended, and ſo held by the court, that an action of debt would not lie upon ſuch a note *until* all the inſtalments had become due.

Morgan in his precedents, p. 584, has given the form of a declaration in debt on a promiſſory note, and *Kyd in his treatiſe on bills and notes p.* 114, *(Dublin Edit.* 1791*)* after noticing ſome of the authorities on this ſubject, ſays, "the concluſion reſulting from the whole "ſeems to be this, that where a privity exiſts between the parties, "there an action of *debt* or *indebitatus aſſumpſit* may be maintained."

Comyns, (Dig. Tit. Debt. (A. 8.) lays down the propoſition generally, "that debt lies *upon every expreſs contract to pay a ſum certain,*" and cites 1 *Leo.* 208. And *Blackſtone, (3 Com.* 154*)* ſays, "the legal "acceptation of *debt* is, a ſum of money due by *certain and expreſs* "*agreement*; as by a bond for a determinate ſum, *a bill or note,*" &c. "The non-payment of theſe is an injury, for which the *proper* remedy "is by action of *debt.*"

But the queſtion is now ſettled in England, in the caſe of *Biſhop v. Young*, 2 *Bos. and Pul.* 78, where it was held that "an action of "*debt* lies by the payee againſt the maker of a promiſſory note ex- "preſſed to be *for value received.*"

The declaration in that caſe was, "for that the defendant, on "at made his certain note in writing commonly called a "pro- "miſſory note, with his own proper hand thereto ſubſcribed bearing "date the ſame day and year aforeſaid, and then and there delivered "the ſaid note to the plaintiff, by which note the ſaid defendant, one "month after date promiſed to pay to the plaintiff or order £. 8. value "received in goods by the defendant, by reaſon whereof and by force "of the ſtatute in that caſe made and provided, the defendant be- "came liable to pay to the plaintiff the ſaid ſum of money in the ſaid "note mentioned, *whereby an action hath accrued*," &c. To this declaration there was a general demurrer, in ſupport of which the counſel relied chiefly on the caſe of *Welſh and Craig*, 8 *Mod.* 373. 1 *Str.* 680.

Lord Chief Juſtice Eldon, in delivering the opinion of the court, examined the caſes cited and the principles on which the action of debt is founded. He held that the ſtatute of *Anne* had put promiſſory notes on the ſame footing, and given upon them the ſame remedy, as was before had upon inland bills of exchange. That an action of debt would lie upon an inland bill of exchange, by the payee againſt the drawer, whom he conſidered as the original debtor, and therefore debt would lie by the payee of a promiſſory note againſt the maker who is the original debtor. He relied alſo on the words *value received*; and cited *Hard.* 485.—*Skin.* 398, *Pearſon v. Garrett. Com. Dig. Debt. B. Debt. A.* 8. *and* 9. *Salk.* 23. *Hard's caſe. Skin.* 346. *Hodges v. Steward.* 10 *Mod.* 32. *Rumball v. Ball.*

The objection that the ſtatute of limitations was not permitted to be given in evidence upon the plea of *nil debet*, is ſupported only by a dictum of *chief juſtice Holt*, in 1 *Salk.* 278. *Anon.* at *niſi prius*, *Anno* 1690, and in the caſe of *Draper v. Glaſſop*, 1 *Lord Ray.* 153, 8 *and* 9 *W.* 3. The reaſon which he gives in the firſt caſe, is, "*For the ſta-* "*tute has made it no debt at the time of the plea pleaded*; the words of "which are in the *preſent tenſe*. But in caſe on *non aſſumpſit* the ſta- "tute of limitations cannot be given in evidence, for it ſpeaks of a "time paſt, and relates to the time of making the promiſe." The reaſon given in the caſe of Draper and Glaſſop, is, "becauſe *non aſſump-* "*ſit* goes to the *præter tenſe*; but upon *nil debet* pleaded the ſtatute is "good evidence, becauſe the iſſue is joined *per verba de preſenti*, and

" without doubt *nil debet* by virtue of the ſtatute; and it is no debt " at this time, though it was a debt."

In 1 *Morgan's V. Mecum*, 220, this caſe is cited with a "*ſed quere*" and he adviſes that the ſtatute ſhould be pleaded.

The expreſſion of the *ſtatute of Jac.* 1. *c.* 16, which is the ſame as that of the act of aſſembly of Maryland, 1715, *c.* 23, is, that the *action* ſhall be brought within ſuch a time, and *not after*. It does not extinguiſh the *debt*, but only bars the remedy at law. The lapſe of time is not of itſelf evidence that the defendant does not owe the money. The ſtatute only creates a diſqualification of the plaintiff to recover, like that of *out-lawry*, *alien enemy*, *feme covert*, &c. or it may be conſidered as a ſpecial protection of the defendant, like a certificate of bankruptcy, infancy, or a diſcharge under an inſolvent act.

That the debt is not extinguiſhed by the ſtatute is clear from the caſes which have been decided ſince the time of lord Holt.

In the caſe of *Quantock v. England*, 4 *Bur.* 2628, it was held that a debt barred by the ſtatute is a good debt to ſupport a commiſſion of bankruptcy. The ſame was expreſsly decided by lord Mansfield at *niſi prius* in the caſe of *Fowler v. Brown*, cited in *Eſp. N. P.* 563. And in *Trueman v. Fenton*, *Cowp.* 548, his lordſhip ſaid, " all the " debts of a bankrupt are due in conſcience, notwithſtanding he " has obtained his certificate. *Though all legal remedy may be gone,* " *the debts are clearly not extinguiſhed in conſcience.* Where a man de- " viſes his eſtate for payment of his debts, a court of equity ſays, " (and a court of law, in a caſe properly before them, would ſay the " ſame) all debts barred by the ſtatute of limitations ſhall come in, " and ſhare the benefit of the deviſe."

Hence it appears that the reaſon which lord Holt gives for the diſtinction between *non aſſumpſit*, and *nil debet*, is not ſupported. And if the reaſon fails the law fails with it.

The objections reſpecting the letters of adminiſtration, and the omiſſion of the *debet and detinet* were ſuppoſed to come too late after verdict.

THE END.

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ABSENT DEBTOR.

UPON an attachment in chancery, under the laws of Virginia, if the record ſtates that "*I. T. in open court, became ſecurity that I. H.* (the abſent debtor) "ſhall perform the "*decree of this court, if againſt him*," *quere*, whether an action of debt will lie againſt I. T. for the amount decreed againſt I. H.
Thompſon v. Jameſon, - 282

ACKNOWLEDGMENT.

A *deed* of lands, in Maryland, ſigned, ſealed and delivered on the 30*th of May* and acknowledged on the 14*th of June*, is to be conſidered as made on the 30*th of May*; and its acknowledgment on the 14*th of June* will not cauſe it to be ſuch a deed as is contemplated in the *bankrupt act*, which came into operation on the 2*d of June* 1800.
Wood v. Owings, - 239

ACT OF GOD.

What ſhall be ſaid to be the act of God, and what *inevitable caſualty?*
Hodgſon v. Dexter, - 345

ACTION.

1. In Virginia it is not always neceſſary to ſue the maker of a promiſſory note, to entitle the holder to an action againſt the indorſer.
Clark v. Young, - - 181
2. If a promiſſory note of a third perſon be indorſed, by the purchaſer of goods, to the vender, as a conditional payment for the goods, *Quere*, whether the vender is, *in any caſe*, obliged to *ſue* the *maker* of the note before he can reſort to the purchaſer of the goods on the original contract of ſale?
Clark v. Young, - - 193
3. A ſuit againſt the defendant as *indorſer of the note*, and a ſuit againſt him *for the goods ſold*, are upon diſtinct and different cauſes of action; and the firſt can not be pleaded in bar of the ſecond. *Ib.* - 193
4. It is not neceſſary for the plaintiff to offer to return *the note*, to entitle him to an action for the *goods ſold*. *ib.* - - - 194
5. In Virginia, an action will not lie by the holder againſt a remote indorſer of a promiſſory note.
Mandeville v. Riddle, - - 290
6. *Quere*, whether the holder of a promiſſory note in Virginia, can not maintain an action *for money had and received*, againſt a remote indorſer? *Dunlop v. Silver*, 367
7. Can he, *for whoſe benefit* a promiſe is made to a third perſon, maintain an action againſt the promiſor? *Ib.* - - - 429

8. Letters of adminiſtration from the orphan's court in the diſtrict of Columbia, are neceſſary to enable an adminiſtrator to maintain an action in the courts of the diſtrict. *Fenwick v. Sears*, - 259

ADMINISTRATOR.

An adminiſtrator, having had letters of adminiſtration in Maryland, before the ſeparation of the diſtrict of Columbia from the original ſtates, cannot, after that ſeparation, maintain an action in that part of the diſtrict ceded by Maryland, by virtue of thoſe letters of adminiſtration, but muſt take out new letters within the diſtrict. *Fenwick* v. *Sears*, 259

ADMIRALTY.

1. Salvage allowed to a ſhip of war of the United States for the re-capture of a *Hamburgh* veſſel out of the hands of the *French (France and Hamburgh being neutral to each other)* on the ground that ſhe was in danger of condemnation under the French arret of 18 January, 1798. *Talbot* v. *Seeman*, - - 1

2. To ſupport a demand for ſalvage, the re-capture muſt be *lawful*, and a meritorious ſervice muſt be rendered. *Id.* - - - 28

3. *Probable cauſe* is ſufficient to render the re-capture lawful. *Id.* 31

4. Where the amount of ſalvage is not regulated by poſitive law, it muſt be determined by principles of general law. *Id.* - 44

5. Marine ordinances of foreign countries, promulgated by the executive by order of the legiſlature of the United States, may be read in the courts of the United States without further authentication or proof. *Quere*, whether they may not be read without ſuch promulgation? *Id.* - - 38

6. Municipal laws of foreign countries are generally to be proved as facts. *Talbot* v. *Seeman*, 38

7. To entitle to ſalvage, in caſes of re-capture, it is not neceſſary that the means uſed ſhould be with that ſole view. *Id.* - 36, 41

8. The rule that ſalvage is not due for the re-capture of a *neutral*, is founded on the *fact*, that no benefit has been conferred. *Id.* 37

9. To entitle to ſalvage, it is not neceſſary that the deſtruction of the thing would have been *inevitable*, but for the means uſed to ſave it; but the danger muſt be real and imminent. *Id.* 42, 43

10. Salvage does not imply a *contract*. *Id.* - - - 42, 43

11. France and the United States were in a ſtate of partial war in the year 1799. *Id.* - 31

12. The ſupreme court of the United States, in caſes of appeal, and on writs of error, are limited to the ſtatement of facts made in the court below. *Id.* - 38

13. A final condemnation in an *inferior* court of admiralty, where a right of appeal exiſts and has been claimed, is not a *definitive* condemnation, within the meaning of the 4th article of the convention with France, ſigned September 30, 1800.

AGENT, PUBLIC.

A public agent of government, contracting for the uſe of government, is not *perſonally* liable, *although the contract be under his ſeal.* *Hodgſon* v. *Dexter*, - 345

APPEAL.

See Admiralty, 12, 13. *Practice*, 12, 13, 14, 15. *Error*, 1, 4, 5, 6, 7. *Juriſdiction*, 3, 4, 5.

1. No appeal or writ of error lies from the courts of the Territory north-weſt of the river Ohio. *Clarke* v. *Bazadone*, - - 212
2. Upon appeal, in chancery caſes, a ſtatement of facts muſt accompany the tranſcript of the record. This proviſion was revived by the repeal of the judiciary act of February 13, 1801. *U. S.* v. *Hooe*, - - 318

APPOINTMENT TO OFFICE.

See Mandamus, 5, 6, 7, 9, 11, 12, 13, 14.

ASSIGNMENT.

See Choſe in Action.

ASSUMPSIT.

See bills of exchange and promiſſory notes, 1, 2, 3, 4, 12, 13, 15, 16, 17, 18, 19, 22, 23.
1. *Aſſumpſit*, for money had and received, will not lie by the holder againſt a remote indorſer of a promiſſory note, in Virginia. *Mandeville* v. *Riddle*, - 290
2. Quere? *Dunlop* v. *Silver*, 367
3. *Aſſumpſit* will not lie upon a policy of inſurance under the *corporate ſeal*, unleſs a new conſideration be averred. *Inſurance Co. of Alexandria* v. *Young*, - - 332
4. Quere, whether an aggregate corporation can make an *expreſs aſſumpſit* unleſs ſpecially authorized by ſtatute? - - *ib.*
5. After verdict, every *aſſumpſit* laid in the declaration is to be taken as an *expreſs aſſumpſit*. *Ib.* 341
6. Quere, whether he, *for whoſe benefit* a promiſe is made, may maintain an action againſt the promiſor? *Appendix*, - - - 429
7. Is *privity* neceſſary to ſupport *indebitatus aſſumpſit* for money had and received? *Appendix*, - 469
8. A judgment in *aſſumpſit* upon a policy under ſeal is a bar to a ſubſequent action of *covenant*, on the ſame policy. *Inſurance Co. Alexandria* v. *Young*, - - 340

ATTACHMENT.

See abſent debtor.

ATTORNIES.

Requiſites to their admiſſion to practice. *Rules of Court*, - xv
Oath to be taken. *Ib.* *ib.*
Shall not practice as counſellors. *Ib.* - - - *ib.*
Counſellors may be admitted to practice as attornies. *Ib.* xvii

BANKRUPT.

See acknowledgment.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In Virginia it is not neceſſary, in all caſes, to ſue the maker of a promiſſory note to entitle the holder to an action againſt the indorſer. *Clark* v. *Young*, - - 181
2. If a promiſſory note of a third perſon be indorſed by the purchaſer of goods to the vender, as a conditional payment for the goods, Quere, whether the vender is, in any caſe, obliged to ſue the maker of the note before he can reſort to the purchaſer of the goods on the original contract of ſale. *Ib.* - - - 181
3. A ſuit againſt the defendant *as indorſer of the note*, and a ſuit againſt the defendant *for the goods ſold*, are upon diſtinct and different cauſes of action; and the firſt can not be pleaded in bar of the ſecond. *ib.*
4. It is not neceſſary for the plaintiff to offer to return the note, to en-

title him to bring ſuit for the goods ſold. *ib.*

5. A declaration in *debt*, upon a foreign proteſted bill of exchange, for the principal, intereſt, damages and *coſts of proteſt*, under the act of aſſembly of Virginia, muſt aver the *amount* of thoſe *coſts of proteſt*.
Wilſon v. *Lenax*. 195

6. Quere, whether the indorſer is diſcharged, if, after due notice to ſuch indorſer of non-payment by the drawee, the holder charge the bill in account current againſt the drawer, and upon the whole of that account the balance due is leſs than the amount of the bill? *ib.*

7. Whether the indorſer, after due notice, is diſcharged by the holder's receipt of part of the money from the drawer? *ib.*

8. Whether it is neceſſary to aver a proteſt for *non-acceptance*, in an action on proteſt for non payment? *ib.*

9. Whether the *drawer* is a competent witneſs for the *indorſer*, in an action againſt the latter.* *ib.*

10. Whether proteſt for non-payment of a foreign bill of exchange muſt be made *on* the laſt day of grace.
Fenwick v. *Sears*, 260

11. Whether the *reaſonableneſs* of notice be matter of *fact*, or matter of *law*. *id.* *ib.*

12. Whether, on the count *for money had and received*, notice of non-acceptance and of non payment, be neceſſary to charge an indorſer who knew, at the time of indorſing, that the drawer had no right to draw. *id.* *ib.*

13. *In Virginia*, an indorſee of a promiſſory note cannot maintain an action againſt a *remote* indorſer, for want of *privity*.
Mandeville v. *Riddle*, 290

14. *In Maryland*, *debt* will not lie on a promiſſory note.
Lindo v. *Gardner*, 343

15. Whether an action for *money had and received*, will lie by the holder againſt a *remote* indorſer of a promiſſory note *in Virginia*?
Dunlop v. *Silver*, 367

16. What was the law in England reſpecting promiſſory notes before the ſtatute of Anne?
Appendix, 368

17. At what time were *inland* bills of exchange conſidered as governed by the cuſtom of merchants?
id. 380

18. When were *inland* bills and *promiſſory notes* firſt introduced into England?
id. 382

19. Did the ſtatute of Anne introduce a *new* law reſpecting promiſſory notes, or did it only affirm the *old*?
id. 383

20. *Goldſmith's notes*.
id. 384

21. Form of declarations upon promiſſory notes before the ſtatute of Anne. *id.* 405

22. Is the contract of the indorſer of a promiſſory note an *expreſs*, or an *implied* contract?
id. 421

23. Are actions upon promiſſory notes in Pennſylvania, founded on the cuſtom of merchants, or on the ſtatute of Anne?
id. 459

24. Will an action of debt lie upon a promiſſory note?
id. 464

BILL OF EXCEPTIONS.

The court is not bound to give an opinion on an abſtract point of law,

* *See Ilderton* v. *Atkinſon*, 7 *T. R.* 421, *and Birt* v. *Kerſhaw*, 2 *Eaſt.* 460.

unleſs it be ſo ſtated as to ſhow its connexion with the cauſe.
Hamilton v. *Ruſſell*, 309

BILL OF SALE.

1. An abſolute bill of ſale of goods is fraudulent as to creditors, *unleſs poſſeſſion accompanies and follows the deed.*
Hamilton v. *Ruſſell*, 309
2. The want of poſſeſſion is not merely *evidence* of fraud, but is a circumſtance *per ſe* which makes the tranſaction fraudulent *in point of law.* *id.* *ib.*

BOND, FORTHCOMING.

In Virginia, a forthcoming bond is an appendage to the original ſuit, and is a component part of the proceedings.
Stuart v. *Laird*, 309

CAVEAT.

See Kentucky 2.

CHANCERY.

See Abſent Debtor. Equity.

CHOSE IN ACTION.

1. What is the meaning, extent, and effect of the rule that a *choſe in action* is not aſſignable?
Appendix, 423
2. Can a *choſe in action* be made aſſignable, or negotiable in its original creation, by the *contract and intention of the parties*, independent of the cuſtom of merchants, and of ſtatute law? *id.* 428

CITATION.

A citation muſt accompany the writ of error.
A writ of error not accompanied by a citation muſt be quaſhed, unleſs the defendant in error ſhould appear. *Lloyd* v. *Alexander*, 365

CITIZEN.

To give juriſdiction to the courts of the United States, the pleadings muſt expreſsly ſtate the parties to be *citizens* of different ſtates, or that one of them is an *alien*. It is not ſufficient to ſay that they *reſide* in different ſtates.
Abercrombie v. *Dupuis*, 343

CLERK.

The clerk of this court, muſt reſide and keep his office at the ſeat of government. He can not practice as attorney or counſel in this court.
Rules of Court, xv
How to make return of a writ of error. *id.* xvi
Not to ſuffer any record to go out of his office. *id.* *ib.*

COLUMBIA DISTRICT.

1. A Juſtice of peace in the diſtrict of Columbia is not removeable at the will of the Preſident.
Marbury v. *Madiſon*, 160
2. The acts of Congreſs of 27th Feb. and 3d March 1801, concerning the diſtrict of Columbia, have not changed the laws of Maryland and Virginia, adopted by Congreſs as the laws of that diſtrict, any further than the change of juriſdiction rendered a change of thoſe laws neceſſary.
U. States v. Simms. 252
3. Fines, forfeitures and penalties ariſing from a breach of thoſe laws are to be ſued for and recovered, in the ſame manner as before the change of juriſdiction, *mutatis mutandis.* *id.* *ib.*
See Adminiſtrator.

COMMISSION.

See Mandamus, 5, 6, 9, 10, 11, 12, 13, 14, 15.

CONGRESS.

1. Congreſs have not power to give original juriſdiction to the ſupreme court of the United States, in other caſes than thoſe deſcribed in the conſtitution.
Marbury v. *Madiſon*, 176
2. An act of Congreſs repugnant to the conſtitution can not become a *law*. *id.* *ib.*
3. A cauſe may by act of Congreſs be transferred from one inferior tribunal to another.
Stuart v. *Laird*, 299
4. Congreſs may conſtitutionally impoſe upon the judges of the ſupreme court of the United States the burden of holding circuit courts *id.* *ib.*

CONSTITUTION.

1. The ſupreme court of the United States, has not power to iſſue a *mandamus* to a *Secretary of State* of the United States, it being an exerciſe of *original* juriſdiction not warranted by the conſtitution, notwithſtanding the act of Congreſs.
Marbury v. *Madiſon*, 137
2. An act of Congreſs repugnant to the conſtitution can not become a *law*. *id.* 176
3. The *courts* of the United States are bound to take notice of the conſtitution.
id. 178
4. A contemporary expoſition of the conſtitution, practiſed and acquieſced under for a period of years, fixes its conſtruction.
Stuart v. *Laird*, 299
5. Congreſs may conſtitutionally impoſe upon the judges of the ſupreme court of the United States, the burden of holding circuit courts.
id. *ib.*

CONSTRUCTION.

See Conſtitution, 4. *Act of God.*

CONTRACT.

See Agent public. Admiralty 10. *Bills of exchange*, 22. *Choſe in Action.*

CONVENTION WITH FRANCE.

See Admiralty, 13.

COPY.

The keeper of a public record can not refuſe a copy to a perſon demanding it on the terms preſcribed by law.
Marbury v. *Madiſon*, 160

CORPORATION.

See Aſſumpſit, 3, 4.
Quere, whether an action on a policy of inſurance will lie againſt the Marine Inſurance Company of Alexandria, in their corporate name, or whether the declaration muſt be againſt the preſident alone.
Inſurance Company of Alexandria v. *Young*, 332

COSTS.

Quere, whether coſts can be awarded againſt the United States.
U. States v. *Simms*, 259
U. States v. *Hooe*, 318

COVENANT.

See Aſſumpſit 8.

COUNSELLORS.

Counſellors ſhall not practice as attornies.
Rules of Court, xv
Their oath and qualifications.
id. *ib.*
May be admitted as attornies.
id. xvii

DEBT.

See Bills of Exchange 5.

1. An action of debt for £. 860 12 1 founded on a decree in chancery, is not supported by a decree for £. 860 12 1, *with interest from a certain day to the day of rendering the decree.* But the variance is fatal. *Thompson* v. *Jameson*, 282
2. Quere, whether *nil debet* is a good plea to an action of debt founded on a judgment of a court of one of the co-States? *id.* 285, 286
3. The declaration must be for the *whole* debt. Or if you declare for part you must show that the residue is satisfied. *id.* *ib.*
4. Debt will not lie upon a *promissory note* in *Maryland.* *Lindo* v. *Gardner*, 343
5. Will *debt* lie upon a promissory note? *Appendix*, 464

DEBTOR.

See Absent Debtor. Insolvent Debtor. Fraud.

A debtor may prefer one creditor to another, and convey goods to him in discharge of his debt. *Wood* v. *Owings*, 244

DECLARATION.

See Bills of Exchange, 1, 2, 3, 4, 5, 8, 15, 21. *Corporation. Debt* 3, 4. *Citizen.*

DEED.

1. Delivery is not necessary to the validity of letters patent, as it is to that of a deed. *Marbury* v. *Madison*, 178
2. *See Acknowledgment.*

DEPARTMENTS, HEADS OF.

See Mandamus, 7, 9, 10, 16, 17, 18, 19, 20.

DEPOSITION.

1. Evidence on motion to discharge bail, must be by deposition and not *viva voce.*—*Rules of court.* xvi
2. The plaintiff in error may show by affidavits that the matter in dispute exceeds the value of 2000 dollars. *id.* xvii

DISTRICT OF COLUMBIA.

See Columbia District.

ENTRY OF LANDS.

See Kentucky 1, 3.

EQUITY.

Subpœna in equity must be served 60 days before the return day.

If the defendant, upon such service, shall not appear, the complainant may proceed *ex parte.* *Rules of Court*, xvi

ERROR.

See Citation.

1. A writ of error lies upon a caveat from the district court of Kentucky district to the supreme court of the United States. *Wilson* v. *Mason*, 45
2. It is not error to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before the court. *Turner* v. *Fendall*, 117, 132
3. Quere, whether, in a case where there is no jury, a judgment ought to be reversed for the rejection of testimony which was admissible in law. Or whether the cause, in the appellate court, should be considered as if the testimony had been received. *id.* 132
4. Writ of error, how to be returned by the clerk below. *Rules of Court.* xvi

5. If the writ of error iſſues *within* 30 days before the meeting of the court, the defendant in error *may* enter his appearance and proceed to trial, otherwiſe the cauſe muſt be continued. *Rules of Court*, xvii
6. Where the writ of error appears to be brought for delay only, the judgment ſhall carry intereſt at 10 *per cent. per annum*, by way of damages. In other caſes 6 *per cent.*
id. *ib*
7. A writ of error does not lie from the ſupreme court of the United States to the general court for the Territory N. W. of the Ohio.
Clarke v. *Bazadone*, 212

EVIDENCE.

See Admiralty, 5, 6, 12.
1. Proceedings before magiſtrates in caſes of inſolvent debtors, under the laws of Virginia, are matters *in pais*, and may be proved by parol teſtimony.
Turner v. *Fendall*, 132
2. *See Error*, 2, 3.
3. A commiſſion is only *evidence* of an appointment.
Marbury v. *Madiſon*, 178
4. Quere, whether the drawer is a competent witneſs for the indorſer in an action againſt the latter?
Wilſon v. *Lenox*, 195
5. The want of poſſeſſion of goods by the vendee under an abſolute bill of ſale is not merely *evidence* of fraud, but is a circumſtance *per ſe* which makes the tranſaction fraudulent *in point of law.*
Hamilton v. *Ruſſell*, 309
6. Evidence on motion to diſcharge bail muſt be by depoſition, and not *viva voce.*—*Rules of Court*, xvi

EXCEPTIONS, BILL OF.

See Bill of Exceptions.

EXCHANGE, BILLS OF.

See Bills of Exchange.

EXECUTION.

1. Money made on a *fieri facias* does not become the *goods and chattels* of the plaintiff, until it has been paid over to him; while it remains in the hands of the officer he can not apply it to the ſatisfaction of another *fieri facias* againſt the former plaintiff.
Turner v. *Fendall*, 117, 136
2. By the command of the writ the officer is to bring the money into court, *there to be paid to the plaintiff.*
id. *ib.*
3. In Virginia, on a motion againſt a ſheriff for not paying over monies by him collected on execution, it is not neceſſary that the *judgment* againſt the ſheriff ſhould be rendered at the next term ſucceeding that to which the execution has been returned.
id. 117, 136
4. Money may be taken in execution, *if in poſſeſſion of the defendant.*
id. 134
5. Although the creditor ſhould have been diſcharged under the *inſolvent act* of Virginia, yet the motion againſt the ſheriff for not paying over monies made on a *fieri facias* muſt be in the name of ſuch creditor.
id. 132

FACTS, STATEMENT OF.

See Appeal 2.—*Admiralty*, 11.

FIERI FACIAS.

See Execution, 1, 2, 3, 4, 5.

FINES AND FORFEITURES.

See Columbia Diſtrict, 3.

FORTHCOMING BOND.

See Bond Forthcoming.

FRANCE.

See Admiralty, 11, 13.

FRAUD.

See Debtor.

1. An abſolute bill of ſale of goods is fraudulent as to creditors *unleſs poſſeſſion accompanies and follows the deed.* *Hamilton* v. *Ruſſell*, 309
2. The want of poſſeſſion, in ſuch caſe, is not merely *evidence* of fraud, but is a circumſtance *per ſe*, which makes the tranſaction fraudulent *in point of law.* *id.* *ib.*

HEADS OF DEPARTMENTS.

See Mandamus, 7, 9, 10, 16, 17, 18, 19, 20.

JEOFAILS.

A verdict will not cure a miſtake in the nature of the action.
Inſurance Company of Alexandria v. *Young*, 332

See Aſſumpſit 5.

INSOLVENT DEBTOR.

See Evidence 1. *Execution* 5. *Debtor.*

INSURANCE COMPANY OF ALEXANDRIA.

See Corporation.

INSURANCE, POLICY OF.

See Aſſumpſit, 3.

JUDGMENT.

See Aſſumpſit, 8. *Office Judgment.*

JUDICIARY.

1. A cauſe may by act of Congreſs be tranſferred from one inferior tribunal to another.
Stuart v. *Laird*, 299
2. Congreſs may conſtitutionally impoſe upon the judges of the ſupreme court of the United States the burden of holding circuit courts *id.* *ib.*
3. The courts of the United States may declare an act Congreſs to of be unconſtitutional. *Marbury* v. *Madiſon*, 137

JURISDICTION.

See Error, 1, 7.

1. The ſupreme court of the United States has not power to iſſue a *mandamus* to a *Secretary of State*, it being an exerciſe of original juriſdiction not warranted by the conſtitution.
Marbury v. *Madiſon*, 137
2. Congreſs have not power to give original juriſdiction to the ſupreme court, in other caſes than thoſe deſcribed in the conſtitution.
id. *ib.*
3. It is the eſſential criterion of *appellate* juriſdiction that it reviſes and corrects the proceedings in a cauſe *already inſtituted*, and does not create that cauſe. *id.* 175
4. To give juriſdiction to the courts of the United States, the pleadings muſt expreſsly ſtate the parties to be *citizens* of different ſtates, or that one of them is an *alien*. It is not ſufficient to ſay that they *reſide* in different ſtates,
Abercrombie v. *Dupuis*, 343
5. The plaintiff in error may ſhow by *affidavit* that the matter in diſpute exceeds 2900 dollars in value.
Rules of Court. xvii

JUSTICE OF PEACE.

See Columbia Diſtrict 1.

KENTUCKY.

1. Waſte and unappropriated land in Kentucky, in the year 1780, could

not be lawfully appropriated by *survey alone*, without a previous legal *entry* in the book of entries.
Wilson v. *Mason*, 45
2. A writ of error upon a caveat lies from the district court of Kentucky district to the supreme court of the United States.
Wilson v. *Mason*, 45
3. A survey in Kentucky, not founded on an entry, is a void act and constitutes no title whatever; and land, so surveyed, remains vacant and liable to be appropriated by any person holding a land warrant.
id. *ib.*

LANDS.

See Kentucky.

LAWS FOREIGN.

See Admiralty 5, 6.

LETTERS PATENT.

Delivery is not necessary to the validity of *letters patent.*
Marbury v. *Madison*, 178

LIMITATIONS.

Quere, whether the statute of limitations can be given in evidence on the plea of *nil debet.*
Lindo v. *Gardner*, 343
Appendix, 465

MANDAMUS.

1. The supreme court of the United States has not power to issue a *mandamus* to a *Secretary of State of the United States*, (notwithstanding the act of Congress) it being an exercise of *original* jurisdiction not warranted by the constitution.
Marbury v. *Madison*, 137
2. Congress has not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.
id. *ib.*
3. An act of Congress repugnant to the constitution can not become a *law*. *Marbury* v. *Madison*, 176
4. The courts of the United States are bound to take notice of the constitution. *id.* 178
5. A commission is not necessary to the appointment of an officer by the executive. *Quere.*
Marbury v. *Madison*, 178
A commission is only *evidence* of an appointment.
id. *ib.*
6. Delivery is not necessary to the validity of *letters patent.*
id. *ib.*
7. The President of the United States can not authorize a Secretary of State to omit the performance of those duties which are enjoined by law. *id.* 160
8. A justice of peace in the district of Columbia is not removable at the will of the President.
id. *ib.*
9. When a commission, for an officer not holding his office at the will of the President, is by him signed and transmitted to the Secretary of State, to be sealed and recorded, it is irrevocable; the appointment is complete. *id.* *ib.*
10. A mandamus is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled.
id. 137
11. When a commission for an officer is signed by the President, the appointment is complete.
id. 157, 162
12. Neither the delivery of the commission, nor its transmission to, nor actual receipt by the officer, is necessary to the appointment.
id. 159, 160
13. Nor is the acceptance of the office necessary to the validity of the appointment. *id.* 161

14. The poſſeſſion of the commiſſion is not neceſſary to authorize the officer to perform the duties of the office. *Marbury* v. *Madiſon*, 160
15. When all the requiſites have been performed which authorize a recording officer to record any inſtrument, and an order for that purpoſe has been given, the inſtrument is, in law, conſidered as recorded, although the manual labour of inſerting it in a book kept for that purpoſe may not have been performed. *id.* *ib.*
16. The keeper of a public record can not eraſe therefrom a commiſſion which has been recorded, nor refuſe a copy to a perſon demanding it on the terms preſcribed by law. *id.* *ib.*
17. There are certain acts of a Secretary of State which are not examinable in the courts of juſtice. *id.* 166
18. He acts in two capacities. 1ſt, as the mere agent of the Preſident. 2d, as a public miniſterial officer of the United States. *id.* 166
19. Where the heads of departments are the political, confidential agents of the executive, merely to execute his will, in caſes where he poſſeſſes a conſtitutional or legal diſcretion, their acts are only politically examinable. *id.* 166, 170, 171
20. But where a ſpecific duty is aſſigned by law, and individual rights depend upon the performance of that duty, an injured individual has a right to reſort to the laws of his country for a remedy. *id.* 166
21. The propriety, or impropriety of iſſuing a mandamus, is to be determined, not by the office of the perſon to whom the writ is directed, but by the nature of the thing to be done. *Marbury* v. *Madiſon*, 170
22. It is the eſſential criterion of *appellate* juriſdiction that it reviſes and corrects the proceedings in a cauſe already inſtituted, and does not create that cauſe. *id.* 175
23. A mandamus may be directed to inferior courts. *id.* *ib.*

MARINE ORDINANCES.

See Admiralty 5.

MARYLAND.

See Bills of Exchange 14. *Acknowledgment.*

MONEY.

See Execution, 1, 2, 3, 4.

MONEY HAD AND RECEIVED.

See Bills of Exchange, 12, 15. *Privity.*

MOTION.

See Execution, 1, 2, 3, 4, 5.

NEUTRAL.

See Admiralty, 1, 8.

NIL DEBET.

Quere, Whether the ſtatute of limitations can be given in evidence on *nil debet*? *Lindo* v. *Gardner*, 343, 465

NORTH-WESTERN TERRITORY.

See Error, 7.

NOTARY PUBLIC.

1. Quere, Whether the acts of a notary public, who certifies himſelf to be duly commiſſioned and ſworn,

are valid, if he be duly appointed, but not actually ſworn in due form? *Fenwick* v. *Sears*, 260

2. Whether, between contending parties, the certificate of a notary public that he is duly commiſſioned and ſworn, can be contradicted? *id.* *ib.*

NOTICE.

See Bills of Exchange, 11, 12.

Notice of an illegal act will not make it valid. *Wilſon* v. *Maſon*, 45

NUDUM PACTUM.

Can there be a nudum pactum in *writing?* Appendix, 443

OFFICE JUDGMENT.

After the firſt term next following an office judgment in Virginia, it is a matter of mere diſcretion in the court, whether they will admit a ſpecial plea to be filed, to ſet aſide that judgment. *Reſler* v. *Shobee*, 110

OFFICER.

See Mandamus, 5, 9, 11, 12, 13, 14, 15, 21.

OHIO.

See Error, 7.

PAYMENT.

See Bills of Exchange, 2, 4.

PENNSYLVANIA.

See Bills of Exchange, 23.

PLEADINGS.

See Bills of Exchange, 1, 2, 3, 4, 5, 8, 15, 21. *Corporation.*—*Debt* 2, 3, 4.—*Aſſumpſit*, 8.—*Citizen.*—*Nil Debet.*

POLICY OF INSURANCE.

See Aſſumpſit, 3.

POSSESSION.

See Bill of Sale.

PRACTICE.

See Bills of Exchange, 1, 2, 3, 4, 5, 8, 9, 10, 12, 13, 14, 15, 21, 23, 24.—*Bill of Exceptions.*—*Citation. Citizen.*—*Evidence* 1.—*Error* 2, 3.

1. In Virginia, after the firſt term next following an office judgment, it is a matter of mere diſcretion in the court whether they will admit a ſpecial plea to be filed to ſet aſide that judgment. *Reſler* v. *Shobee*, 110

2. Money made on a *fi. fa.* does not become the goods and chattels of the plaintiff until it has been paid over to him; while it remains in the hands of the officer he can not apply it to the ſatisfaction of another *fi. fa.* againſt the former plaintiff. *Turner* v. *Fendall*, 117, 136

3. By the command of the writ the officer is to bring the money into court, there to be paid to the plaintiff. *ib.*

4. On a motion, in Virginia, againſt a ſheriff for not paying over money by him collected on execution, it is not neceſſary that the *judgment* againſt the ſheriff ſhould be rendered at the *next* term ſucceeding that to which the execution has been returned. *ib.*

5. Money may be taken in execution if in the poſſeſſion of the defendant. *id.* 134

6. Although the creditor ſhould have been diſcharged under the inſolvent law of Virginia, yet the motion againſt the ſheriff for not paying over money made on a *fi. fa.*

must be in the name of such creditor. *Turner* v. *Fendall*, 132
7. Quere, Whether the ſtatute of limitation can be given in evidence on the plea of *nil debet*? *Lindo* v. *Gardner*, 343, 465
8. The practice in the ſupreme court of the United States is to be conformable to that of the king's bench and chancery in England. *Rules of Court*, xvi
9. A ſtatement of the caſe muſt be furniſhed to the court by the counſel on each ſide of a cauſe. *id.* *ib.*
10. Evidence on motion to diſcharge bail, muſt be by depoſition and not *viva voce*. *id.* *ib.*
11. Subpœna in equity muſt be ſerved 60 days before the return day. If the defendant, upon ſuch ſervice, ſhall not appear, the complainant may proceed *ex parte*. *id.* *ib.*
12. The plaintiff in error may ſhow by *affidavit* that the matter in diſpute exceeds the value of 2000 dollars. *id.* xvii
13. When the defendant in error fails to appear the plaintiff may proceed *ex parte*. *id.* *ib.*
14. If the writ of error iſſues *within* 30 days before the meeting of the court, the defendant in error may enter his appearance and proceed to trial; otherwiſe the cauſe muſt be continued. *id.* *ib.*
15. Where the writ of error appears to be brought for delay only, the judgment ſhall carry intereſt at 10 *per cent. per annum*, by way of *damages*. In other caſes 6 *per cent.* *id.* *ib.*

PRESIDENT OF THE UNITED STATES.

1. A commiſſion is not neceſſary to the appointment of an officer by the executive. *Marbury* v. *Madiſon*, 178
2. The Preſident can not authorize a Secretary of State to omit the performance of thoſe duties which are enjoined by law. *id.* 160
3. A juſtice of peace in the diſtrict of Columbia is not removeable at the will of the Preſident. *id.* *ib.*
See Mandamus.

PRIVITY.

See Bills of Exchange, 13, 15.
Is privity neceſſary to ſupport *indebitatus aſſumpſit* for money had and received? *Appendix*, 439

PROBABLE CAUSE.

See Admiralty, 3.

PROCESS.

1. Proceſs ſhall be in the name of the Preſident of the United States. *Rules of Court*, xv
2. Subpœna in equity muſt be ſerved 60 days before the return day. *id.* xvi

PROMISSORY NOTES.

See Bills of Exchange, 1, 2, 3, 4, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

PROTEST.

See Bills of Exchange, 5, 7, 10.

PUBLIC AGENT.

See Agent Public.

RECORD.

1. When all the requiſites have been performed which authorize a recording officer to record any inſtrument, and the order for that

purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed.
Marbury v. *Madison*, 160
2. The keeper of a public record can not erase therefrom a commission which has been recorded, nor refuse a copy to a person demanding it on the terms prescribed by law.
id. *ib.*

RULES OF COURT.

See page xv.

SALE, BILL OF.

See Bill of Sale.

SALVAGE.

See Admiralty, 1, 2, 3, 4, 7, 8, 9, 10.

SECRETARY OF STATE.

See Mandamus, 1, 7, 9, 10, 16, 17, 18, 19, 20.

SHERIFF.

See Execution, 1, 3, 5.

STATEMENT OF FACTS.

See Admiralty, 11.—*Appeal*, 2.

SURVEY OF LANDS.

See Kentucky, 1, 3.

VARIANCE.

See Debt, 1.

VERDICT.

1. A verdict will not cure a mistake in the nature of the action.
Insurance Company of Alexandria v. *Young*, 332
2. After verdict, every *assumpsit* in the declaration is to be taken as an *express assumpsit*.
id. 341

VIRGINIA.

See Bills of Exchange, 1, 2, 3, 4, 5, 13, 15.—*Bond Forthcoming.*—*Absent Debtor.*—*Office Judgment.*—*Execution*, 3, 5.—*Evidence*, 1.

WITNESS.

See Evidence, 4.

WRIT OF ERROR.

See Admiralty, 12.—*Appeal*, 1, 2.—*Error*, 1, 4, 5, 6 7.